

(11)
No. 93-289-CFX
Status: GRANTED

Title: John H. Dalton, Secretary of the Navy, et al.,
Petitioners
v.
Arlen Specter, et al.

Docketed:
August 23, 1993

Court: United States Court of Appeals for
the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Kauffman, Bruce

Entry	Date	Note	Proceedings and Orders
1	Aug 23 1993	G	Petition for writ of certiorari filed.
2	Sep 23 1993		Brief of respondents Arlen Specter, et al. in opposition filed.
3	Sep 29 1993		DISTRIBUTED. October 15, 1993
4	Oct 8 1993	X	Reply brief of petitioners filed.
5	Oct 18 1993		Petition GRANTED. *****
6	Nov 2 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Third Circuit.
7	Nov 12 1993		Record filed.
		*	Certified proceedings United States District Court, Eastern District of Pennsylvania (BOX)
8	Dec 2 1993		LODGING consisting of one bound volume submitted by amicus curiae Business Executives for National Security.
9	Dec 2 1993		Joint appendix filed.
10	Dec 2 1993		Brief of petitioners John Dalton, Secretary of the Navy, et al. filed.
11	Dec 2 1993	G	Motion of Business Executives for National Security for leave to file a brief as amicus curiae filed.
12	Dec 13 1993		Motion of Business Executives for National Security for leave to file a brief as amicus curiae GRANTED.
13	Dec 15 1993	D	Motion of respondents for divided argument filed.
14	Dec 29 1993		SET FOR ARGUMENT WEDNESDAY, MARCH 2, 1994. (1ST CASE).
17	Jan 5 1994		Brief amicus curiae of State of New York filed.
18	Jan 5 1994		Brief of respondents Arlen Specter, et al. filed.
16	Jan 6 1994	G	Motion of Public Citizen for leave to file a brief as amicus curiae filed.
19	Jan 7 1994		CIRCULATED.
15	Jan 10 1994		Motion of respondents for divided argument DENIED.
21	Jan 24 1994		Motion of Public Citizen for leave to file a brief as amicus curiae GRANTED.
22	Feb 9 1994	X	Reply brief of petitioner filed.
23	Mar 2 1994		ARGUED.

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FILED

AUG 23 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE
NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 (Base Closure Act), 10 U.S.C. 2687 note (Supp. IV 1992), establishes a mechanism to identify unneeded domestic military bases for closure and realignment. The questions presented are:

1. Whether the base closure and realignment recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission or the President's decision to accept or reject the Commission's recommendations is subject to judicial review under the principles set forth in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992).

2. Whether the Base Closure Act itself "preclude[s] judicial review" of statutory claims for purposes of the Administrative Procedure Act, 5 U.S.C. 701(a)(1).

PARTIES TO THE PROCEEDING

Petitioners herein, who were defendants below, are John H. Dalton, Secretary of the Navy; Les Aspin, Secretary of Defense; The Defense Base Closure and Realignment Commission; and the Commission's members—James A. Courter; Peter B. Bowman; Beverly B. Byron; Rebecca G. Cox; Hansford T. Johnson; Harry C. McPherson, Jr.; and Robert D. Stuart, Jr. All petitioners except James A. Courter and Robert D. Stuart, Jr. are substituted as parties pursuant to Rule 35.3 of this Court.

Respondents in this Court, who were plaintiffs below, are Sen. Arlen Specter; Sen. Harris Wofford; Sen. Bill Bradley; Sen. Frank Lautenberg; Governor Robert P. Casey; Commonwealth of Pennsylvania; Ernest D. Preate, Jr., Pennsylvania Attorney General; Rep. Curt Weldon; Rep. Thomas Foglietta; Rep. Robert Andrews; Rep. R. Lawrence Coughlin; City of Philadelphia; Howard J. Landry; International Federation of Professional and Technical Engineers, Local 3; William F. Reil; Metal Trades Council, Local 687 Machinists; Governor James J. Florio; State of New Jersey; Robert J. Del Tufo, New Jersey Attorney General; Governor Michael N. Castle; State of Delaware; Rep. Peter H. Kostmeyer; Rep. Robert A. Borski; Ronald Warrington; and Planners Estimators Progressman & Schedulers Union Local No. 2.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and the Chairman and members of the Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 995 F.2d 404. A prior opinion of the court of appeals (App., *infra*, 26a-82a) is reported at 971 F.2d 936. The opinion of the district court (App., *infra*, 85a-91a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993. App., *infra*, 92a-94a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Defense Base Closure and Realignment Act of 1990 (Base Closure Act or Act), as amended, 10 U.S.C. 2687 note (Supp. IV 1992),¹ and relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 and 704, are reproduced at App., *infra*, 98a-130a.

STATEMENT

Respondents brought this action seeking to enjoin the closure of the Philadelphia Naval Shipyard under the Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. C.A. App. 61, 65, 68.² A divided panel of the court of appeals concluded that certain of respondents' procedural objections to base-closure recommendations made by the Secretary of Defense to the Defense Base Closure and Realignment Commission—and by the Commission to the President—are subject to judicial review under the APA. App., *infra*, 60a-62a. Subsequently, in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), a case involving a similar statutory scheme, this Court held that recommendations of subordinate officials to the President do not

¹ The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, has been amended in respects not relevant here. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, Tit. III, § 344(b)(1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1345, 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608. For simplicity, we refer to sections of the Base Closure Act as codified in 10 U.S.C. 2687 note (Supp. IV 1992).

² Respondents are Members of Congress from Pennsylvania and New Jersey; Pennsylvania, New Jersey, and Delaware, and officials thereof; the City of Philadelphia; Philadelphia Naval Shipyard workers; and local unions. See App., *infra*, 28a.

constitute "final agency action" under the APA, 5 U.S.C. 704, and that the APA does not apply to the President's actions. We accordingly petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the court of appeals' decision, and remanded the case for further consideration in light of *Franklin*. App., *infra*, 83a-84a.

On remand, a divided panel of the court of appeals concluded that *Franklin* permits judicial review of procedural claims under the Base Closure Act, reasoning that if the Secretary of Defense and the Commission committed procedural errors, the President acted beyond his constitutional authority in approving the Commission's recommendations. App., *infra*, 9a-12a. In so doing, the panel's decision on remand (1) evades the holding of *Franklin* and broadly subjects the President's actions to judicial review despite the limited scope of the APA; (2) squarely conflicts with the First Circuit's recent decision in *Cohen v. Rice*, 992 F.2d 376 (1993); and (3) threatens the integrity and expedition of the carefully designed process that Congress established in the Base Closure Act.

A. Statutory Background

The Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, established a mechanism for identifying and closing unnecessary domestic military bases. The Act provides for three rounds of base closures,³ to take place in 1991, 1993, and 1995. § 2903(c)(1). For each round, the Secretary of Defense must submit a six-year "force-structure plan * * * based on an assessment * * * of the probable threats to the

³ The Base Closure Act also governs so-called "realignments," which include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." § 2910(5). For convenience, we use the term "base closures" to refer to both base closures and realignments.

national security" during that period. § 2903(a). The Secretary also must establish, after notice and an opportunity for public comment, selection criteria to be used in making base closure recommendations. § 2903(b). Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. § 2903(c).

The Act requires the Secretary of Defense, by April 15 in 1991 (and by March 15 in 1993 and 1995), to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent commission established under the Act.⁴ §§ 2902(a), 2903(c)(1). The Commission is charged with holding public hearings and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. § 2903(d)(1) and (2). The Commission may make changes in the Secretary's recommendations if it determines that the Secretary has "deviated substantially" from the force-structure plan and the selection criteria. § 2903(d)(2)(B) and (C). The Commission must then forward its report to the President by July 1. § 2903(e).

The President may approve or disapprove the Commission's recommendations, and must transmit his determination to Congress and the Commission by July 15. § 2903(e)(1)-(3). If the President disapproves the Commission's recommendations, it must prepare new recommendations and resubmit them to the President no later than August 15. § 2903(e)(3). If the President then disapproves the revised recommendations (or takes no action by September 1), no bases may be closed that year under the Act. § 2903(e)(5).

If the President approves the initial or revised recommendations, Congress then reviews the President's decision

⁴ The Secretary must make available to the Commission and the Comptroller General (*viz.* the General Accounting Office (GAO)) all the information used in making his recommendations. § 2903(c)(4).

through the mechanism of considering a joint resolution of disapproval. §§ 2904(b), 2908. If a joint resolution of disapproval is enacted (after presentment to the President for signing), the Secretary of Defense may not close or realign the bases approved by the President. § 2904(b). If a joint resolution is not enacted within 45 days or by the date Congress adjourns for the session, whichever is earlier,⁵ the Secretary is required to close or realign all of the military installations approved by the President for closure or realignment. § 2904(a).

B. The Proceedings In This Case

1. a. On April 15, 1991, the Secretary of Defense transmitted to the Commission a list of domestic military installations for closure or realignment. That list included the Philadelphia Naval Shipyard. 56 Fed. Reg. 15,184 (1991). The Commission held public hearings in Washington, D.C., as well as in Philadelphia and elsewhere around the country, receiving testimony from officials of the Department of Defense, legislators, and expert witnesses. Members of the Commission visited major facilities recommended for closure, including the Philadelphia Shipyard. The Commission's final report recommended the closure or realignment of 82 bases. Those recommendations differed from the Secretary's in several respects, but the Commission concurred in the Secretary's recommendation to close the Philadelphia Shipyard. App., *infra*, 33a.

On July 10, 1991, the President approved the Commission's recommendations. C.A. App. 52. The Armed Services Committees of both Houses of Congress conducted hearings on the recommended closures. App., *infra*, 33a-34a. On July 30, 1991, the House of Representatives entertained a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing

⁵ To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate ordinary delays. § 2908.

debate, several of the respondent Members of Congress contended that the proposed resolution should be passed because of alleged flaws in the procedures by which the Philadelphia Shipyard was recommended for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The House, however, ultimately rejected the resolution of disapproval by a vote of 364 to 60. *Id.* at H6039; App., *infra*, 34a.

b. On July 8, 1991, respondents filed this action under the APA and the Base Closure Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. C.A. App. 7, 61, 65, 68. Respondents claimed, among other things, that the Secretary of Defense and the Commission failed to comply with certain procedural requirements alleged to be imposed by the Base Closure Act. See, e.g., *id.* at 58-59, 67; App., *infra*, 6a-7a n.3 35a, 60a, 62a. Respondents did not name the President as a defendant, nor did they allege that he had violated the Act or otherwise acted unlawfully.

On November 1, 1991, the district court granted the government's motion to dismiss the suit in its entirety. App., *infra*, 85a-91a. The district court concluded that the Base Closure Act itself "preclude[s] judicial review" for purposes of the APA, 5 U.S.C. 701(a)(1). App., *infra*, 85a-88a. It held, in the alternative, that the political question doctrine forecloses review of the base closure decision. *Id.* at 88a-91a.

2. a. A divided panel of the court of appeals affirmed in part and reversed in part. See App., *infra*, 26a-82a.⁶

⁶ The court of appeals held that the plaintiff union members and Philadelphia Shipyard employees had standing to challenge the base closure. Because the positions of all the plaintiffs were the same, the court declined to address the standing of the others. App., *infra*, 36a-39a.

As a preliminary matter, the court of appeals considered whether the actions at issue in this case constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. Although respondents were challenging actions or omissions of the Secretary of Defense and the Commission in making their recommendations, the court acknowledged that "at least in one sense, we are being asked to review a presidential decision." App., *infra*, 43a. As the court explained, because the Secretary and the Commission have authority only to make recommendations under the Act, respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. *Id.* at 42a. The court of appeals recognized that the APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that Act. *Id.* at 43a. Nevertheless, the court concluded that the APA's judicial review provisions "represent[] a codification of the common law" and that the actions of the President are not, as such, automatically immune from judicial review at common law. *Ibid.*

Turning to other grounds for preclusion of review under the APA, the court of appeals held that the Base Closure Act itself precludes judicial review of some, but not other, claims under the Act. First, the court held that no judicial review of decisions under the Act is available prior to the effective date of the President's decision—*i.e.*, until after expiration of the 45-day period for congressional review under Section 2904(b). The court explained that the Act sets a very stringent timetable and that "the ability of participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention." App., *infra*, 44a-45a.

Second, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found that the substance of the President's base closure decision "is committed by law to presidential dis-

cretion.” App., *infra*, 46a; see 5 U.S.C. 701(a)(2) (no judicial review of actions “committed to agency discretion by law”). Similarly, the court determined that judicial review is unavailable to the extent that it relates to the merits of base closure recommendations prepared by the Secretary and the Commission. App., *infra*, 56a-60a, 61a-62a.

At the same time, the court detected no evidence that Congress intended to preclude judicial review of alleged noncompliance by the Secretary or the Commission with certain of the Act’s procedural provisions. App., *infra*, 60a-62a. Specifically, the court found that judicial review would be available for (1) a claim that the Secretary failed to transmit to the Commission and the GAO all of the information that the Secretary used in making his recommendations, and (2) a claim that the Commission did not hold public hearings as required by the Act. *Id.* at 60a, 62a & n.15.

Finally, the court rejected the claims of the union and shipyard employees that the alleged violations of the Base Closure Act violated their rights under the Due Process Clause. The court reasoned that the Act created no property interest in the plaintiffs. App., *infra*, 67a-69a.⁷

b. Judge Alito dissented, concluding that the Base Closure Act precludes judicial review of all statutory claims, procedural and substantive. App., *infra*, 69a-82a. After examining the structure and history of the Act, Judge Alito reasoned that judicial review of individual base closures would undermine the Act’s objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved in a single package. *Id.* at 74a-82a. He also

⁷ The court of appeals also reversed the district court’s ruling that this lawsuit should be dismissed under the political question doctrine. App., *infra*, 63a-67a.

concluded that the legislative history, which discusses the need to eliminate litigation-related obstacles to base closure, supports preclusion of judicial review. *Id.* at 70a-74a.

3. On June 26, 1992, this Court issued its decision in *Franklin v. Massachusetts*, 112 S. Ct. 2767, which, *inter alia*, addressed the existence of “final agency action” in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act provides that the Secretary of Commerce must submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled under a statutory formula. This Court held that the Secretary’s report was not “final agency action” because it served as “a tentative recommendation” and carried “no direct consequences for reapportionment.” *Id.* at 2774. Although the President’s action had sufficient indicia of finality, the Court held that the President is not an “agency”—and that his certification to the House of Representatives therefore is not “agency action”—for purposes of the APA. *Id.* at 2775.

Because of the similarities between this case and *Franklin*, we petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Franklin*. App., *infra*, 83a-84a.

4. a. On May 18, 1993, a divided panel of the court of appeals held on remand that *Franklin* does not affect the reviewability of respondents’ procedural claims. App., *infra*, 1a-25a. The court reasoned that the Court in *Franklin* “declined only to review the President’s decision under the APA” and that it “expressly sanctioned” judicial review of the constitutionality of Presidential decisions. App., *infra*, 10a. The majority concluded that if the Secretary and the Commission violated the Base Closure Act’s

procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. *Id.* at 10a-12a. The majority further reasoned that because the President may act only pursuant to constitutional or statutory authority, review of Presidential action for consistency with the "non-discretionary mandates of [an] authorizing statute" was "a form of constitutional review" authorized under *Franklin*. *Ibid.*

b. Judge Alito again dissented. App., *infra*, 19a-25a. He noted that respondents "vigorously contended * * * that *Franklin* does not bar review under the APA," and did not argue "that they were entitled to non-APA review based either on common law or separation of powers principles." *Id.* at 20a. Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the Base Closure Act's procedural requirements. *Id.* at 21a-25a.

c. On June 14, 1993, the court of appeals denied petitioners' petition for rehearing and suggestion of rehearing en banc. Judges Hutchinson, Nygaard, and Alito would have granted rehearing en banc. App., *infra*, 92a-94a.

REASONS FOR GRANTING THE PETITION

Because it allows judicial review of alleged procedural errors in the formulation of the Commission's nonbinding recommendations to the President, the court of appeals' decision in this case cannot be reconciled with this Court's decision in *Franklin v. Massachusetts*, *supra*. By holding that the President's action is reviewable—for constitutional error—whenever his subordinates allegedly commit procedural errors under the statute authorizing the President to act, the court of appeals' decision opens the door to

broad non-APA judicial challenges to Presidential action. The ruling below therefore eviscerates the limits on judicial review recognized by this Court in *Franklin*. It also creates a direct conflict with the First Circuit's recent decision in *Cohen v. Rice*, *supra*, which dismissed a virtually identical suit challenging a base closure in Maine and specifically held that *Franklin* precludes judicial review of all claims under the Base Closure Act.

1. a. The court of appeals' decision in this case squarely conflicts with the principles of judicial review set forth by this Court in *Franklin v. Massachusetts*, *supra*. Under the statute at issue in *Franklin*, the Secretary of Commerce prepared a report to the President containing each State's population according to the 1990 census, and the President, in turn, certified to Congress the number of United States Representatives to which each State was entitled under a statutory formula. *Franklin*, 112 S. Ct. at 2771. The plaintiffs claimed, *inter alia*, that the Secretary's method of allocating military service members among the States was arbitrary and capricious under the APA.

This Court held that there was no "final agency action" that may be reviewed under the APA. *Franklin*, 112 S. Ct. at 2773. Turning first to the report prepared by the Secretary of Commerce, the Court explained that the "core question" regarding finality was "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Ibid.* Because the Secretary's report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774.

By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. *Franklin*, 112 S. Ct.

at 2775. The Court held, however, that it was not final “agency” action for purposes of the APA. “Out of respect for the separation of powers and the unique constitutional position of the President,” the Court held that the APA’s “textual silence” concerning its coverage of the President was insufficient “to subject the President to [its] provisions.” *Ibid.* Because “the APA does not expressly allow review of the President’s actions,” the Court “presume[d] that his actions are not subject to its requirements.” *Id.* at 2775-2776.

A straightforward application of *Franklin* makes clear that there likewise is no “final agency action” reviewable under the APA in this case. As relevant here, respondents’ complaint challenges the validity of the procedures used by the Secretary of Defense and the Commission to prepare their base closure recommendations. Like the Secretary’s report in *Franklin*, the base closure report of the Commission is only tentative and has “no direct effect” (*Franklin*, 112 S. Ct. at 2774), until after the President certifies his approval of the report to Congress. See § 2904(a) and (b); pp. 4-5, *supra*. The actions of the Secretary of Defense, which precede those of the Commission in the decision-making process, are even more “tentative.” *Franklin*, 112 S. Ct. at 2774. In short, because the challenged actions of the Commission and the Secretary are merely nonbinding and preliminary to the President’s final decision, they do not, under *Franklin*, constitute “final agency action” that is subject to judicial review under the APA.⁸ See also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333

⁸ If anything, the Secretary’s and the Commission’s recommendations in this case are more clearly nonfinal than the report of the Secretary of Commerce in *Franklin*. Whereas the President’s role in reapportionment is “admittedly ministerial” (*Franklin*, 112 S. Ct. at 2775), the Base Closure Act explicitly contemplates that the President must approve or disapprove the Commission’s recommendations, and he may end the process entirely by disapproving the Commission’s recommendations. § 2903(e) (3) and (5).

U.S. 103, 113 (1948) (administrative actions “are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process”). And because the President is not an “agency,” his action in approving the Commission’s recommendations and certifying that approval to Congress is not subject to judicial review under the APA. *Franklin*, 112 S. Ct. at 2775-2776.

b. Although this Court vacated the court of appeals’ prior decision and remanded it for further consideration in light of the principles articulated in *Franklin* (see 113 S. Ct. 455; App., *infra*, 83a-84a), the court of appeals evaded *Franklin*’s holding by recasting respondents’ routine statutory claims of procedural error by subordinate officials into constitutional claims of ultra vires action by the President.⁹ Relying on this Court’s observation in *Franklin* that “the President’s actions may * * * be reviewed for constitutionality” (112 S. Ct. at 2776), and citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), for the proposition that the President’s actions must be rooted in constitutional or statutory authority, the court of appeals in this case held that allegations of defects in the President’s subordinates’ compliance with the requirements of an authorizing statute automatically raise constitutional questions that are reviewable under *Franklin*. App., *infra*, 10a-12a. That reasoning, however, is inconsistent with *Franklin* and traditional precepts governing judicial review of governmental acts.

⁹ In fact, respondents did not purport to challenge the President’s actions, on constitutional or other grounds. In their brief on remand, respondents emphasized that “it is the conduct of [the] defendants—not that of the President—that [they] challenge.” Resp. C.A. Remand Br. 12 (emphasis omitted). Respondents explained, moreover, that they “do not seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party.” *Id.* at 8.

First, the court of appeals has applied the concept of ultra vires action so broadly that it effectively does away with *Franklin's* restrictions on judicial review of Presidential action. The court in this case held that respondents stated a constitutional challenge to Presidential action in approving recommendations that allegedly were formulated in a procedurally flawed manner by his subordinates. If such claims of garden-variety statutory error by subordinates are sufficient to trigger "common law" judicial review of the President's actions (App., *infra*, 8a)—notwithstanding *Franklin* and the limited reach of the APA—then few if any challenges to Presidential actions will be unreviewable in practice.

That result would sharply undermine *Franklin's* concern for "the separation of powers and the unique constitutional position of the President." *Franklin*, 112 S. Ct. 2775. By vesting the ultimate decision concerning base closures in the President (subject to legislative disapproval), Congress assigned responsibility for final action to a uniquely accountable official, and one whose actions are not reviewable under the APA for routine defects. In light of the separation of powers considerations articulated in *Franklin* and other decisions of this Court (cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 747-753 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)), the court of appeals erred in subjecting the President's final action to broad judicial review for alleged statutory error in the way his subordinates formulated their tentative, nonbinding recommendations under the Base Closure Act.

In approving broad judicial review, moreover, the court of appeals misplaced reliance on *Youngstown* by conflating claims of statutory error and claims of ultra vires Executive conduct, and then by characterizing all challenges to ultra vires conduct as raising constitutional claims. At issue in this case are respondents' claims that (1) the Secretary of Defense failed to transmit certain

information to the Commission and the GAO; and (2) that the Commission based its decision in part on private meetings rather than public hearings. See App., *infra*, 6a-7a n.3. The court of appeals did not suggest that those routine allegations of statutory error on the part of the Secretary or the Commission were themselves of constitutional dimension. If they were, virtually every claim of statutory error by any federal agency would fall in that category, thereby constitutionalizing the entire body of law governing judicial review of agency action. That result would be a radical departure from the long-settled view that judicial review of an agency's compliance with statutory standards and limitations is itself subject to regulation and preclusion by Act of Congress—now, through the APA. Such a dispute arising under a federal statute is not automatically transformed into one arising under the Constitution whenever it is alleged that the President exercised his statutory authority on the basis of recommendations that were formulated by federal agencies in a manner that departed from statutory standards.¹⁰

By contrast, *Youngstown* involved an emergency Presidential order to seize private steel mills during the Korean War. Although two statutes authorized the seizure of

¹⁰ In *Franklin*, the plaintiffs challenged the counting of overseas military personnel on the ground that it was inconsistent with the Census Act, as well as with the APA and the Constitution. See *Commonwealth v. Mosbacher*, 785 F. Supp. 230, 231 n.31 (D. Mass. 1992); *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment in part); Brief for Appellees at 74-76. Although the majority did not specifically refer to that claim in this Court, its holding that the appellees had no right of judicial review to raise their statutory challenge under the APA would apply equally to their challenge under the Census Act. Both types of challenges are provided for under the APA, 5 U.S.C. 706(1) (allowing court to set aside agency actions that are "arbitrary and capricious," "an abuse of discretion," or "in excess of statutory * * * authority"), and the absence of "final agency action" therefore precludes judicial review of both.

private property under specified conditions, the government in *Youngstown* conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that it regarded the pertinent statutory authority as "too cumbersome, involved, and time-consuming." 343 U.S. at 586. The government instead relied on the President's inherent power under the Constitution as authority for the seizure, and this Court held that the Constitution did not furnish that authorization. The claims of ultra vires conduct in *Youngstown* are therefore a far cry from respondents' routine and contested claims of procedural irregularity in the formulation of tentative, nonbinding recommendations for the President under a statute that concededly *does* authorize the President to take the action respondents challenge. Moreover, the action challenged in *Youngstown* directly invaded property rights of the plaintiffs that were independently protected by the Constitution. In this case, by contrast, the court of appeals acknowledged that respondents have no property rights protected by the Constitution in the base closure setting. App., *infra*, 67a-69a. There can be no serious doubt that Congress can decline to provide for judicial challenges to actions of the President or other Executive officials at the behest of individuals whose own constitutional rights are not at stake.¹¹

The distinction between routine statutory claims, such as those advanced by respondents here, and claims of

¹¹ In *Franklin*, the Court concluded that although judicial review under APA standards was precluded, "that does not dispose of appellees' constitutional claims." 112 S. Ct. at 2776 (citing *Webster v. Doe*, 486 U.S. 592, 603-605 (1988)). In *Franklin*, the constitutional claim was based on the appellees' own asserted right as voters to an apportionment of Representatives in conformity with the Constitution. See 112 S. Ct. at 2776 (citing *United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415 (1992)). And in *Webster v. Doe*, it was based on the personal right of the plaintiff under the equal protection component of the Due Process Clause. No such individual rights are at issue in this case.

ultra vires action is illustrated by this Court's precedents addressing sovereign immunity. See, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In such cases, the Court has distinguished between (1) claims that an officer acted "*ultra vires* his authority," which are the proper subject of specific relief, and (2) mere "claim[s] of error in the exercise of that power," which are barred by sovereign immunity. *Id.* at 689-690.¹² As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." *Id.* at 691 n.12; see *Noble v. Union River Logging R.R.*, 147 U.S. 165, 174 (1893).¹³ Although the distinction is not always simple to apply (see *International Primate Protection League v. Administrators of Tulane Education Fund*, 111 S. Ct. 1700, 1708 (1991)), a finding of ultra vires executive action re-

¹² As this Court explained, the theory underlying such cases was that when "the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his actions "are *ultra vires* his authority and * * * may be made the object of specific relief." *Ibid.*

¹³ For an illustration of a case that involved mere error, see *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218 (1913), upon which the Court relied heavily in *Larson*, 337 U.S. at 700-702. In *Goldberg*, the Secretary of the Navy awarded a contract for a surplus vessel to someone other than the high bidder. The high bidder then filed suit to compel the Secretary to deliver the surplus vessel to him. Although the lower courts considered whether the sale was consummated when the Secretary opened the high bid, this Court refused to address the merits of that issue. As the Court later explained in *Larson*, "[w]rongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." *Larson*, 337 U.S. at 700-701.

quires a "depart[ure] from a plain official duty" (*Payne v. Central Pac. Ry.*, 255 U.S. 228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 110-111 n.20 (1984) (collecting cases); cf. *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876) (specific relief against violation by state officers of "plain official duty, requiring no exercise of discretion").

Under those principles, the court of appeals in this case erred in holding that respondents' procedural allegation against the Secretary of Defense and the Commission automatically state claims of ultra vires Presidential action. As the court below acknowledged, "the President and Congress * * * may reject the Commission's recommendations for any reason at all," and "the decision on which bases to close is committed by law to presidential discretion." App., *infra*, 46a, 69a. That conclusion cannot be reconciled with the court of appeals' subsequent holding that the President acts wholly beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims that the Secretary or the Commission erred, the President was under no "plain official duty" (*Payne*, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error, and he was not disabled from "mak[ing] a decision at all" in the circumstances presented here. *Larson*, 337 U.S. at 691 n.12.¹⁴ Far from having acted

¹⁴ The only obligation imposed on the President by the Base Closure Act is to decide, in his discretion, whether to approve or disapprove the Commission's recommendations and to give notice of his decision to the Commission and Congress. § 2903(e)(1)-(4). As Judge Alito explained in dissent (App., *infra*, 23a-24a):

Nothing in the[] provisions of the [Act] suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at

in excess of his authority under the Base Closure Act, the President did precisely what the Act authorized him to do.

c. The court of appeals' decision in this case conflicts with the First Circuit's recent decision in *Cohen v. Rice*, *supra*. The plaintiffs in that case challenged the closing of the Loring Air Force Base in Limestone, Maine, and made many of the same allegations against the Secretary and the Commission that respondents have made here. In particular, the plaintiffs in *Cohen*, like respondents in this case, alleged that the responsible service Secretary did not provide all of the required information to Congress and the GAO, and that the Commission failed to hold the public hearings required under the Act. 992 F.2d at 380. The First Circuit affirmed the district court's dismissal of the action in its entirety, agreeing that *Franklin* was "directly applicable to the facts of the present controversy." 992 F.2d at 381 (quoting *Cohen v. Rice*, 800 F. Supp. 1006, 1011 (D. Me. 1992)). The First Circuit explicitly rejected the contention that *Franklin* did not apply because the case before it "involve[d] a challenge to the

any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the affected base was tainted by prior procedural irregularities.

Commission's faulty *procedures*" rather than the substance of its recommendations. 992 F.2d at 382. The court emphasized that *Franklin* drew no such distinction and that, in any case, it was "a distinction without a legal difference." *Ibid.* Thus, the court of appeals in *Cohen*, unlike the Third Circuit in this case, did not reach out to recast the plaintiffs' statutory allegations as reviewable claims of unconstitutional Presidential action.

If the President, the Department of Defense, and the Commission are to administer the Base Closure Act in a coherent manner that is consistent across the Nation—and that treats all closures in a single package in a uniform manner—the same agency actions cannot be reviewable in one circuit and unreviewable in another. Further review is therefore warranted to resolve the conflict between the decision below and *Cohen*, and to establish that *Franklin* in fact bars judicial review of procedural claims under the Base Closure Act.

2. The court of appeals also erred in holding in its prior opinion (App., *infra*, 48a-55a) that the Base Closure Act does not "preclude judicial review" under the APA, 5 U.S.C. 701(a)(2). As discussed above (p. 6, *supra*), the district court dismissed this suit in its entirety on the ground that the Base Closure Act implicitly precludes judicial review of all claims arising under the Act. App., *infra*, 85a-88a. In reversing that decision, the court of appeals seriously misapprehended the extent to which judicial intervention is contrary to the structure and purposes of the Base Closure Act.

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. App., *infra*, 40a-41a. In our view, reliance on that presumption is misplaced in the context of the Base Closure Act, which addresses sensitive questions of national security and military policy. See *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (presump-

tion of reviewability "runs aground when it encounters concerns of national security"). As this Court has explained, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530 (citing cases). Indeed, the Third Circuit acknowledged that the Base Closure Act calls for exercise of "the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources." App., *infra*, 46a. Because the base closure process therefore necessarily involves sensitive judgments of military policy (see, e.g., § 2903 (a), (c)(1) and (d)(2)), the court of appeals erred in applying the ordinary administrative law presumption that Congress desires judicial review of the outcome of an administrative process.¹⁵

Even if the general presumption applies in this setting, moreover, it may be rebutted "whenever [a] congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Block v. Community Nutrition Institute*, 467 U.S. 340, 351 (1984). The pertinent congressional intent may be found in a variety of sources. The presumption "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349. The pertinent congressional intent "may also be inferred from contemporaneous judicial construction barring review and congres-

¹⁵ Although the court of appeals purported to limit its holding to the Secretary's and the Commission's alleged violations of statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. The Act provides that the President can approve or disapprove the Commission's recommendations for any reason at all (App., *infra*, 46a, 69a); the court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his subordinates have not observed every procedural particular alleged to be required under the Act.

sional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." *Ibid.* (citation omitted). Most importantly, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Ibid.* When measured against those standards, the Base Closure Act precludes judicial review of the base closure process.

First, the structure of the Base Closure Act indicates that judicial review is incompatible with the statutory scheme. Like its immediate predecessor, the Defense Authorization Amendments and Base Closure and Realignment Act (1988 Act), Pub. L. No. 100-526, 102 Stat. 2623,¹⁶ the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases.¹⁷ H.R. Conf.

¹⁶ The 1988 Act provided for an independent Commission on Base Realignment and Closure. § 203, 102 Stat. 2627-2628. The Commission submitted a report recommending base closures to the Secretary of Defense, who was not authorized to close bases under the 1988 Act unless he approved the report and transmitted it to Congress. §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act provided a waiting period for Congress to enact a joint resolution of disapproval. § 202(b), 102 Stat. 2627. The 1988 Act provided authority for only one round of base closures.

¹⁷ Previous legislation prohibited base closures unless the Secretary of Defense provided Congress and the public with prior notice; gave a "detailed justification" for the action, including "statements of the estimated fiscal, local economic, budgetary, environmental, strategic, and operational consequences" of the proposed closure; and allowed Congress 60 days to halt the process. Military Construction Authorization Act, 1978, Pub. L. No. 95-82, § 612(a), 91 Stat. 379 (codified at 10 U.S.C. 2687(b) (Supp. I 1977)). Moreover, the 1977 legislation made base closure decisions subject to the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.* See 10 U.S.C. 2687(b)(3) (Supp. I 1977). For a variety of reasons (including protracted NEPA litigation), the 1977 statute "effectively prevented [the Department of Defense] from closing any major military installation." Defense Base Clo-

Rep. No. 923, 101st Cong., 2d Sess. 705 (1990); see H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 2, at 8 (1988). At the same time, it was recognized that base closure legislation should address the tendency of "political pressures * * * to interfere" with the integrity of the process. H.R. Rep. No. 735, *supra*, Pt. 2, at 8-9; see H.R. Conf. Rep. No. 923, *supra*, at 705; 1991 Report at 1-1 to 1-2; App., *infra*, 77a-79a (Alito, J., dissenting in part).

Accordingly, the 1990 Act is structured to minimize the ways in which political maneuvering can delay or derail the base closure process. The Act does so in part by striking a careful balance between the roles of the President and Congress in the process. Although the Act vests the Executive Branch with substantial control over the selection of bases for closure, it also provides for extensive congressional involvement throughout the process. For example, the Act requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the development of base closure recommendations for the President. See, *e.g.*, § 2903 (a)(1), (b)(2), (c)(1) and (d)(3). And the process facilitates substantial congressional oversight by adopting streamlined legislative procedures designed to eliminate the usual opportunities for delay and strategic maneuvering. §§ 2904(b), 2908.

A critical aspect of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To safeguard the Commission's role in the process, the Act provides that its recommendations must be considered as an indivisible package. H.R. Conf. Rep. No. 923, *supra*, at 704. The President may trigger base closures under the Act only by approving "all the

sure and Realignment Commission, *Report to the President 1991*, at 1-1 [hereinafter 1991 Report]; see H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988).

recommendations" of the independent Commission. See § 2903(e)(2) and (4).¹⁸ The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approved for closure, and no amendments to the joint resolution may be entertained. § 2908(a)(2) and (d)(2).

By allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove a package of base closures, the court of appeals has struck at the heart of the carefully balanced statutory mechanism enacted by Congress. Under the court's decision, private parties—whose elected representatives failed to achieve their goals through the Act's streamlined legislative procedure—will be able to pick apart the end product of that process. If litigants can sue to extract an individual base (such as the Philadelphia Naval Shipyard) from the package of closures and require the Commission to redo its recommendation for that base, then "the President and Congress will be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base." App., *infra*, 82a (Alito, J., dissenting in part).¹⁹ That result is inconsistent with Congress's objective, evident on the face of the Act, to break the political stalemate through the use of a unitary process of base closures superintended by both political Branches.

¹⁸ The President, of course, is free to disapprove the Commission's recommendations in whole or in part. § 2903(e)(3). If he does so, the Commission produces a new set of recommendations. At that point, if the President does not approve "all the recommendations," no base closures can be effectuated under the Act for that round. § 2903(e)(4) and (5).

¹⁹ The court of appeals' ruling also fails to appreciate the interrelationship of the determination to close certain bases, and to reassign functions to various other bases, as part of a single package. If a court enjoins the closing of one base, it will undermine the assumptions on which other parts of the package rest. See App., *infra*, 81a (Alito, J., dissenting in part).

Second, the availability of procedural challenges threatens to reintroduce into the base closure process a significant hazard that the 1988 and 1990 Acts were designed to avoid—protracted delays from litigation. Prior to the enactment of those 1988 and 1990 Acts, litigants effectively blocked base closures by mounting procedural challenges to base closures under NEPA. See H.R. Conf. Rep. No. 1071, *supra*, at 23; note 17, *supra*. Accordingly, the Base Closure Act forecloses all NEPA actions relating to the base selection process, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. § 2905(c). Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra*, at 23. Congress recognized that NEPA challenges could impede or defeat base closures despite the procedural nature of the litigation, and Congress acted to eliminate the threat of such disruptive procedural litigation. There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring NEPA challenges to the selection decision while allowing broad procedural attacks on the way the Commission formulates its non-binding recommendations to the President.²⁰

²⁰ Contrary to the court of appeals' view (App., *infra*, 51a), it is not plausible that Congress's disallowance of NEPA suits carries the negative implication that other types of procedural claims may be brought under the Act. As discussed in the text, NEPA cases were the primary litigation-related impediments to base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977. 10 U.S.C. 2687(b)(3) (Supp. I 1977). Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3)); hence, it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

Third, the court of appeals' ruling jeopardizes the Act's insistence on expedition and finality. See App., *infra*, 75a-77a, 81a-82a (Alito, J., dissenting in part). Based on Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work" (H.R. Rep. No. 665, *supra*, at 384), the Act imposes a series of strict time limits that are designed to bring the base selection process to a prompt conclusion. See pp. 4-5, *supra*. Congress recognized that delay had been one-of the primary causes of the stalemate over base closures. See App., *infra*, 75a-77a (Alito, J., dissenting in part); H.R. Conf. Rep. No. 923, *supra*, at 705 (noting that prior base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress." App., *infra*, 75a (Alito, J., dissenting in part). Congress's strong emphasis on expedition in the process of selection is incompatible with the availability of protracted litigation to displace the results of that process thereafter.²¹

That conclusion is reinforced by the cyclical nature of the base closure process under the Act. The Act provides for three successive biennial rounds of base closures (see p. 3, *supra*), and the finality of the decisions in each round is critical to planning in the following round. Delay by litigation over the bases closed during one round will inevitably interfere with successive rounds by creating

²¹ Even after the base selection process is complete, the Base Closure Act places a continuing premium on expedition and finality. While the Act permits a limited class of NEPA suits concerning implementation of the final base closure decision, the Act subjects such suits to a 60-day time limit. § 2905(c)(3). That strict time limit is inexplicable if speed and finality lose their significance once closure decisions have become final.

uncertainty about the existing base structure and capacity of the Armed Services.

Fourth, the Act's legislative history strongly supports the conclusion that Congress intended to preclude all judicial review. As Judge Alito explained in dissent, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." App., *infra*, 73a; see H.R. Conf. Rep. No. 923, *supra*, at 706 ("Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * *, the issuance of selection criteria * * *, the Secretary of Defense's recommendation of closures and realignments * * *, the decision of the President * * *, and the Secretary's actions to carry out the recommendations of the Commission.").²² Moreover, the Act's legislative history undercuts the court of appeals' distinction between the reviewability of substantive and procedural claims; it evinces a clear concern for the ability of procedural litigation to derail the selection of obsolete bases for closure. See App., *infra*, 70a-72a (Alito, J., dissenting in part) (discussing legislative history on NEPA's applicability).²³

Fifth, the court's decision creates significant remedial concerns. Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recom-

²² Although the majority concluded that the legislative history referred only to instances of nonfinal agency action (App., *infra*, 53a-54a), it acknowledged that some of the actions described by the report as unreviewable "concededly do not fit" that explanation. *Id.* at 54a.

²³ In addition, although the court of appeals purported to limit its decision to procedural matters, judicial review will inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Shipyard and other naval installations.

mendations to the Secretary and Commission for further proceedings in accordance with the Act. App., *infra*, 55a n.13. The Commission itself, however, goes out of existence after each of the biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members (other than the Chairman) expire at the end of the Session of Congress in which they were appointed. § 2902(d)(1) and (e)(1). Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been assembled for the next biennial round. At that point, the Commission is occupied with the next set of base closures. Moreover, the Act expressly provides that, after expiration of the 45-day period for congressional disapproval of the President's report and certification, the Secretary of Defense "shall * * * close all military installations recommended for closure by the President pursuant to section 2903 (e)." § 2904(a) (emphasis added). A court has no authority at that point to interfere with the Secretary's performance of this mandatory duty by reviewing actions of the Secretary or the Commission that took place before the President submitted the report to Congress. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is inconceivable that Congress intended to permit any judicial review of the base closure decisions at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1993

APPENDIX A

Filed May 18, 1993

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON; REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3; WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL No. 2

v.

H. LAWRENCE GARRETT, III, Secretary of the Navy; RICHARD CHENEY, Secretary of Defense; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

(1a)

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-4322)

On Remand from the Supreme Court
of the United States
(No. 92-485)

Reargued February 24, 1993

BEFORE: STAPLETON, SCIRICA and ALITO,
Circuit Judges

(Opinion Filed May 18, 1993)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This action to enjoin the defendants from carrying out a decision to close the Philadelphia Naval Shipyard is before us for the second time. In our initial opinion in this case. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992), we held, *inter alia*, that plaintiffs' claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Defense Base Closure and Realignment Act of 1990 could proceed in the district court. Our mandate, however, was vacated by the Supreme Court and the case was remanded for reconsideration in light of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). After consideration of the impact of *Franklin* upon our prior holding, we conclude that no change in that holding is warranted. We will therefore remand this matter to the district court for further proceedings consistent with our earlier opinion.

I.

A.

In *Franklin*, the Supreme Court was presented with a situation at least superficially similar to the one before us; however, it is the differences between the two cases that we find dispositive. *Franklin* was a suit against the President, the Secretary of Commerce, and a number of other public officials challenging the methods used in the 1990 census and the manner in which the number of seats in the House of Representatives had been allocated to the various states. Plaintiffs' claims were based upon the Administrative Procedure Act (APA) and the Constitution. A three judge panel of the United States District Court for the District of Massachusetts initially found in favor of the plaintiffs and granted the relief sought—relief which included an injunction directing the Secretary of Commerce to alter her reapportionment report and the President to recalculate the number of Representatives per State and transmit the new calculation to Congress. *Franklin*, 112 S. Ct. at 2770.

The Supreme Court reversed. It first analyzed plaintiff's claim under the APA which allows review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1988). The Court concluded that the Secretary of Commerce's report to the President on the results of the census does not constitute "final agency action" and is therefore unreviewable under the APA because "[t]he President, not the Secretary takes the final action that affects the States." *Franklin*, 112 S. Ct.

at 2775; see also *id.* at 2773 ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). Next, the Court held that although the President's calculation of the number of Representatives and forwarding of that calculation to Congress is a final action, the President is not an "agency" within the meaning of the Act and thus, the President's action is not reviewable for abuse of discretion under the APA. *Id.* at 2775. Finally, the Court noted that there is judicial review of presidential action to determine whether it violates the Constitution; however, it concluded that the action complained of in *Franklin* was not unconstitutional.

B.

The action currently before us is a suit against the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure Commission seeking to enjoin the closing of the Philadelphia Naval Shipyard.¹ Under the Defense Base Closure and Realignment Act of 1990 ("the Act"), it is the responsibility of the Secretary of Defense to close the bases designated as a result of the process prescribed by the Act, Pub. L. No. 101-510, §§ 2904-2905, 104 Stat. 1808, 1812-14 (1990), and the primary relief sought here is an order enjoining the Secretary from closing the Shipyard. The alleged basis for this relief is that the process that resulted in the designation of the Shipyard as a base to be closed did not comply with the requirements set forth in the Act.

¹ The President is not a defendant in this suit.

In our prior opinion, we first held that there could be no judicial review prior to the end of the process required by the Act because there was no final decision prior to that point that had an adverse impact on the plaintiffs.² We also concluded that the decision-making of the President under the Act was committed to his discretion and not properly reviewable. *Specter*, 971 F.2d at 946 ("One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure"). Similarly, we held that the decisionmaking of other federal officials (i.e. the Secretary of Defense, the members of the Commission) challenged by plaintiffs was committed to their discretion and not judicially reviewable. *Id.* at 950-53. However, we also held that the district court could review the claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Act.³ Specifically, we concluded:

² More specifically, we held that action could be judicially reviewed "only if its impact upon plaintiffs is direct and immediate One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decision are merely preliminary in nature." *Specter*, 971 F.2d at 946.

³ For instance, we held that the allegation that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendation" as required by § 2903(c)(4) of the Act was judicially reviewable. *Specter*, 971 F.2d at 952. Similarly, we also held reviewable the plaintiffs' contention "that the Act requires

[W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base*. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

Id. at 947 (footnote omitted).

Although we noted that because "it is the implementation of the President's decision that we have

the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy." *Id.* at 952-53.

We stressed, however, that the extent of judicial review in this context was very limited and that plaintiffs, while purporting to complain about specific procedural defects, were in large part seeking to get the district court to second guess decisions committed by the Act to executive discretion. *Id.* at 953. It is apparent to us from plaintiffs' Brief for Appellants on Remand that plaintiffs have failed to acknowledge the limited character of the review our prior opinion permits.

been asked to enjoin, . . . at least in one sense, we are here asked to review a presidential decision," *id.* at 945, we concluded that this would not bar review of plaintiffs' procedural claims:

Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represent a codification of the common law. 5 Kenneth C. Davis, *Administrative Law* 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). . . . It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

Id. at 945.

III.

Examination of our prior decision in light of *Franklin* suggests to us that no change in outcome is required. *Franklin's* holding that the Secretary of Commerce's report to the President did not constitute a reviewable final action because it did not have an immediate and direct impact on the plaintiffs confirms our initial conclusion that there was no reviewable final action here until after the President designated the Shipyard as a facility to be closed and Congress failed to overturn that action. *See Specter*, 971 F.2d at 945 ("We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b).").

More importantly, the Court's conclusion that the President is not an "agency" under the APA, and thus, presidential action is not reviewable for abuse of discretion under the APA's standards is entirely consistent with our prior decision in which we assumed, without deciding, that the President is not an agency within the meaning of the APA.⁴ Because our prior holding was not based on the existence of APA abuse of discretion review, but rather on the belief that courts may review actions taken at the direction of the President to determine whether those actions are within applicable constitutional and statu-

⁴ As previously noted, we explicitly concluded that our holding permitting review of plaintiffs' claims that the closing process had violated the specific procedural mandates of the statute would be "the same whether or not the APA applies to presidential decisionmaking." *Specter*, 971 F.2d at 945.

tory authority, a modification of our prior mandate only would be warranted if *Franklin* might be read as foreclosing the limited review we previously upheld.

In *Franklin*, the Court declined only to review the President's decision under the APA. It expressly sanctioned judicial review of presidential decision making for consistency with the Constitution and said nothing about review of presidential action for consistency with the statute authorizing such action. In concluding in our earlier opinion that judicial review was available here, we relied upon the existence of judicial review prior to the adoption of the APA and upon various authorities indicating that the judicial review provisions of the APA represent a "codification of the common law." *Id.* at 945. While we there described this extra-APA review as common law review, our reexamination of the relevant authorities in light of *Franklin* has persuaded us that there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case. We would, in any event, be reluctant to infer from *Franklin*'s silence on the matter a prohibition of judicial review where presidential action is alleged to be in conflict with non-discretionary mandates of the authorizing statute because the Court had no occasion to consider that issue in *Franklin*. There, the only non-constitutional allegation made by (and, indeed, available to) plaintiffs was that the proposed action represented an abuse of discretion (*i.e.*, arbitrary and capricious conduct) prohibited by the APA. Here, by contrast, plaintiffs allege that the process underlying the decision to close the Ship-

yard violated specific nondiscretionary provisions of the Base Closing Act—the only authority advanced by the defendants for the closing.

We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. *See id.* at 585; *see also United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990) ("It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any . . . must stem from an act of Congress or from the Constitution itself." (citing *Youngstown Steel*)); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) ("'*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.'") (quoting *Nixon v. Sirica*, 487 F.2d 700, 793 (Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. *See, e.g., National Treasury Employees Union*, 492 F.2d at 604 ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch."); *see also* U.S. Const. Art. II, § 3 ("[T]he President shall take care that the laws be faithfully executed . . ."). Indeed,

we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. *Youngstown*, 343 U.S. at 585-86. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*. 112 S.Ct. at 2776 (citing *Youngstown*).

The plaintiffs in this case, unlike the plaintiffs in *Franklin*, do not ask the court to review under the APA for arbitrary and capricious conduct. Rather, they allege that closing the Shipyard would be inconsistent with specific, nondiscretionary directives of the Base Closing Act—the only authority advanced by the defendants for their proposed action. The President, no less than his lieutenants, must have statutory or constitutional authority for his actions and where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.⁵

⁵ In holding here that the President must have at his disposal information collected in accordance with statutory procedures, we do not hold that the district court may review the entirely distinct question of whether and to what extent the President uses the information. As we previously held, the Act commits that decision to the President's discretion. *Specter*, 971 F.2d at 946.

IV.

The defendants insist that there can be no judicial review in this case because such review is barred by the doctrine of sovereign immunity. We disagree.

We first note that limited judicial review of federal action has long been available at common law:

[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949); see also *Youngstown Steel*, 343 U.S. at 585-87. Although this principle is limited, see, e.g., *Larson*, 337 U.S. at 690 ("A claim of error in the exercise of [delegated] power is . . . not sufficient."),⁶ as counsel for the defendants con-

⁶ *Larson* was essentially a breach of contract action against an agent of the federal government. The Court rejected plaintiff's contention that the agent's breach was *ultra vires* and thereby stripped of sovereign immunity protection; instead, it held that because the agent was authorized to "administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment," his actions were within delegated authority and were therefore protected by sovereign immunity: "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." *Larson*, 337 U.S. at 695.

ceded at oral argument, and as both *Youngstown Steel* and *Franklin* make clear, judicial review of the constitutionality of executive action is not barred by the doctrine of sovereign immunity. Thus, where, as here, plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the only statute authorizing such action and has thereby violated the constitutionally-mandated separation of powers, sovereign immunity concerns do not apply.

Even if the inapplicability of sovereign immunity in this context were not clear from the doctrine enunciated in *Larson* and *Youngstown Steel*, however, we believe this case would still be controlled by the express waiver found in the APA:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1988).

Here, plaintiffs do not seek monetary damages; they seek injunctive relief.⁷ Plaintiffs also state a claim that the Secretary of the Navy, the Secretary of Defense, and the Base Closure Commission have acted under color of legal authority in violation of the Act and that the Secretary of Defense, similarly acting under color of legal authority, is threatening

⁷ Effective relief can be granted by an order prohibiting the Secretary of Defense from closing the Shipyard.

to close the Shipyard as the final step of an illegal process. This is thus a situation that § 702 literally reads on. It is also a situation that precisely fits the congressional intent behind this waiver of sovereign immunity. See, e.g., H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6121 ("The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as to a bar to judicial review of Federal administrative action . . ."); *id.* at 9, 1976 U.S.C.C.A.N. at 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."); 4 Kenneth C. Davis, *Administrative Law Treatise* § 23:19, at 192 (2d ed. 1984) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than money damages is no longer a defense.".)⁸ Our cases are also clear that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA. See *Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980); *Jaffee v. United States*, 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979); see also 4 Davis, *supra*, § 23:19, at 195 ("The abolition of sovereign immunity in § 702 is

⁸ The legislative history of the immunity waiver also indicates congressional recognition of the *ultra vires* doctrine and the difficulties and complexities involved in its application: it evinces an intent to eliminate the need for "wispy fictions" in favor of a clear waiver. See H.R. Rep. No. 1656, *supra*, at 5-7, 1976 U.S.C.C.A.N. at 6125-28.

not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . .' No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA.").

The only argument we can conceive against the applicability of § 702 here is that the President was involved at one stage of the process that led to the allegedly illegal action that will injure plaintiffs. While, as we earlier concluded, the nature of the role assigned to the President by the Act makes his decisionmaking unreviewable, the fact that he played a role provides no justification for holding the process and the final executive action immune from review for compliance with the mandatory procedural requirements of the Act. While suits, like *Franklin*, seeking to secure presidential action or forbearance pose special problems, those problems are not presented in the situation before us.⁹ As Justice Scalia

⁹ Indeed, given *Franklin's* holding that the President is not an "agency" within the meaning of the APA, the waiver of sovereign immunity contained in § 702 may not apply to suits against the President. Nevertheless, this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President—a situation not present here. While we do not regard *Franklin* as turning on sovereign immunity doctrine, we note that § 702 might not waive sovereign immunity in the situation there before the Court. As the *Franklin* Court recognized, "it is President's personal transmittal of the report to Congress that settles the reapportionment." *Franklin*, 112 S. Ct. at 2775. In *Franklin*, it appears that the only effective relief was relief that would require the President's

explained in his opinion in *Franklin*, the fact that the federal courts "cannot direct the President to take a specified executive act" does not

in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Panama Refinancing Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935)—just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, see, e.g., *Powell v. McCormack*, 395 U.S. 486, 503-506, 89 S.Ct. 1944, 1954-1956; 23 L.Ed.2d 491 (1969); *Domkowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive.

Franklin, 112 S. Ct. at 2790 (Scalia, J., concurring).

V.

Accordingly, we conclude that nothing in *Franklin* suggests that our prior approach to this case was incorrect. We reaffirm our prior opinion and we will

forbearance. See *Franklin*, 112 S. Ct. at 2790 (Scalia, J., concurring) ("[W]e cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush.").

remand to the district court for further proceedings consistent therewith. In light of the objectives of the Act discussed in our prior opinion, the district court should conduct those proceedings as expeditiously as possible.

Alito, *Circuit Judge*, dissenting.

The majority rests its decision on arguments that are not properly before us, since the plaintiff-appellants did not raise them either before or after remand from the Supreme Court. Moreover, I believe that the majority's arguments are wrong on the merits and may have unfortunate future implications. I therefore respectfully dissent.

I.

When this case was initially before us, the majority held that the closing of the Philadelphia Naval Shipyard was subject to judicial review to determine whether certain procedural requirements of the Defense Base Closure and Realignment Act of 1990 had been satisfied. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992). The Supreme Court subsequently decided *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), which concerned, among other things, whether the Administrative Procedure Act authorized review of actions taken under a statutory scheme similar to that in the Defense Base Closure and Realignment Act. The Court held that the Secretary of Commerce's report to the President concerning the total population by states as revealed by the decennial census is not "final agency action" reviewable under the APA. 5 U.S.C. § 704, and that actions taken by the President are not subject to APA review. After handing down its decision in *Franklin*, the Supreme Court vacated this court's prior decision in this case and remanded for reconsideration in light of *Franklin*, *O'Keefe v. Specter*, 113 S. Ct. 455 (1992)¹

¹ Neither of the arguments suggested by *Franklin*—i.e., that the recommendations of the Base Closure Commission do not

On remand, the plaintiffs vigorously contended that the statutory scheme in *Franklin* is materially different from the scheme involved here and that *Franklin* therefore does not bar review under the APA. The plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based on either common law or separation of powers principles. Nor had the plaintiffs advanced either of those theories when this case was initially before us or, as far as I can determine, when the case was in the district court. The majority, however, chooses to sidestep the APA argument that the plaintiffs have pressed. Instead, the majority grounds its decision on the common law and separation of powers arguments that it has devised and injected into this case.

I cannot endorse this approach. I would address the argument that the plaintiffs have raised and that the parties have briefed—i.e., whether, despite *Franklin*, the closing of the Shipyard is reviewable under the APA. The First Circuit recently considered *Franklin*'s effect on judicial review under the Defense Base Closure and Realignment Act. *Cohen v.*

constitute "final agency action" under the APA and that presidential action is not reviewable under the APA—was raised by the defendants when this appeal was first before us. The defendants contend that we must nevertheless reach these issues because they are jurisdictional. Whether or not an appellate court would always be compelled to consider issues of this nature even if they are not raised by the parties, I believe it is appropriate for us to reach them here. If we refused to reach these issues now, the case would be remanded, and the defendants could then raise them before the district court. Under these circumstances, our refusal to entertain these issues at the present time might further delay the expeditious disposition of this case.

Rice, 92-2427, 1993 LW 131914 (1st Cir. May 3, 1993). The plaintiffs in that case alleged that the process had been tainted by "faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO." *Id.* at *6. The First Circuit held that under *Franklin* APA review for these claims was unavailable. Because I agree that the statutory scheme at issue here is not materially distinguishable from the scheme in *Franklin*. I would hold that APA review is unavailable. And I would go no further.

II.

Since the majority has gone further, however, and since the majority's analysis may affect future cases. I will explain briefly why I believe the majority's analysis is flawed. The majority opinion, as I understand it, reasons as follows. First, "[t]he President must have constitutional or statutory authority for whatever actions he wishes to take." Majority Typescript at 10. Second, judicial review is available outside the APA to determine whether presidential action violates or exceeds that authority. *Id.* at 10-12. Third, under the Base Closure and Realignment Act, the President lacks statutory authority to approve or implement the closing of a base if the Base Closure Commission's recommendation regarding that base was tainted by violations of the Act's procedural requirements.² Therefore, since the plaintiffs in this

² The majority puts it as follows (majority typescript at 8), quoting *Specter v. Garrett*, 971 F.2d 936, 947 (3d Cir. 1992)):

Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed*

case allege that such procedural violations occurred with respect to the Philadelphia Naval Shipyard, the President's approval of the closing of the Shipyard and/or the Secretary of Defense's implementation of the closing are subject to non-APA judicial review.

Putting aside whatever else may be said about this analysis, it seems plain to me that its third step is incorrect, for the Base Closure and Realignment Act does not limit the President's authority in the way the majority suggests. The Act does not require the President to reject the Commission's package of recommendations if the recommendations regarding one or more bases are tainted by procedural violations. Nor does the Act require or authorize the President or his subordinates to refrain from carrying through with the closing or realignment of such bases following presidential approval of the Commission's package and the expiration of the period for congressional disapproval.

The President's powers and responsibilities under the Base Closure and Realignment Act are clearly set out in Section 2903(e). In brief, the President, after receiving the Commission's package of recommenda-

by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.

The majority later adds that the President's authority under the Base Closure and Realignment Act to approve or order the closing of a base "has been expressly confined by Congress to action based on a particular type of process." Majority typescript at 12. In addition, the majority states that the President's subordinates are "threatening to close the Shipyard as the final step of an illegal process." Majority typescript at 13.

tions by July 1 of the year in question, must decide whether to accept the entire package or return it to the Commission. If, as was the case in 1991, the President decides to accept the package, he must transmit a report containing his approval to the Commission as well as to Congress. He must also transmit a copy of the Commission's recommendations and a certification of his approval to Congress. Section 2903(e)(1), (2). Congress then has 45 days to disapprove the package (Section 2904(b)), and if, as was the case in 1991, Congress does not disapprove, the Secretary of Defense "shall" close and realign bases in accordance with the package. Section 2904(a).

Nothing in these provisions suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the

affected base was tainted by prior procedural irregularities.

Under the plain language of the Base Closure and Realignment Act, the President's sole responsibility, upon receiving a package of recommendations from the Commission, is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission. After the President has approved a package of recommendations and the time for congressional disapproval has expired, the sole responsibility of the Secretary of Defense is to carry out the indicated closings and realignments. In the case before us, this is precisely what the President did and what the Secretary of Defense wishes to do, and therefore I see no possible ground for arguing that the Executive violated any statutory command or exceeded its statutory authority at these stages of the base closure and realignment process.³

The Base Closure and Realignment Act calls for three cycles of recommended closures and realignments—in 1991, 1993, and 1995. In this case, we are still considering a closure that was recommended and approved in the first cycle. In the meantime, the sec-

³ As I noted in my prior dissent (971 F.2d at 956 n.2), the plaintiffs are not challenging the propriety of anything that occurred after the transmission of the Commission's recommendations to the President. Rather, their claims relate to actions taken at earlier stages. But as the majority itself has recognized, actions taken prior to the end of the process required by the Act had no adverse impact on the plaintiffs and thus are not subject to judicial review under any theory. Majority typescript at 7 & n.2.

ond cycle is already well underway. When Congress enacted the Base Closure and Realignment Act, it knew that unnecessary military installations can waste enormous sums of money and that litigation can effectively delay closings and realignments for years. In my view, Congress clearly wanted to put an end to these delays, but our court, by allowing judicial review of base closings and realignments, is frustrating the implementation of Congress's intent.

A True Copy: _____

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON; REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3; WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMAYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL No. 2 v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETARY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL No. 2, APPELLANTS

Filed April 17, 1992

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-4322)

Argued January 28, 1992

Before: STAPLETON, SCIRICA and ALITO,
Circuit Judges

(Opinion Filed April 17, 1992)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

This is an action to enjoin the Secretary of Defense from carrying out a decision to close the Philadelphia Naval Shipyard ("Shipyard"). The plaintiffs-appellants ("plaintiffs") are Shipyard workers; their unions; members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the City of Philadelphia. The defendants-appellees ("defendants") are the Secretary of Defense, the Secretary of the Navy, and the independent Defense Base Closure and Realignment Commission ("Commission") and its members.

The Defense Base Closure and Realignment Act of 1990 ("the Act") is the latest in a series of statutes enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed and realigned. In 1977, Congress passed legislation allowing the Secretary of Defense to close a particular base only after (1) notifying the Committees on Armed Services of the Senate and House of Representatives of the bases selected for closure; (2) submitting to these Committees an evaluation of the various consequences of the closure (including

the local economic, environmental, budgetary and strategic consequences); and (3) deferring action for at least sixty days, during which time Congress could act legislatively to halt the closure or realignment. 10 U.S.C. § 2687(b) (Supp. IV 1980). The statute also required the Secretary to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). *Id.*

Eleven years later, Congress enacted the Base Closure and Realignment Act of 1988, the immediate predecessor of the 1990 Act. Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). Under the 1988 Act, the Secretary of Defense could no longer unilaterally choose bases for closure. Instead, that Act vested a new independent commission with the power to recommend bases for closure. *Id.* §§ 201(1), 203(b)(1-2), 102 Stat. at 2627-28. These recommendations were to be presented to the Secretary of Defense for approval or disapproval in their entirety. *Id.* §§ 201(1), 202(a)(1), 102 Stat. at 2627. If the Secretary approved the recommendations, the 1988 Act gave Congress 45 days within which to disapprove them. *Id.* § 202(b), 102 Stat. at 2627. The 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA. *Id.* § 204(c)(1), 102 Stat. at 2630. The legislative history of the 1988 Act indicates that Congress dropped the NEPA requirements in an effort to avoid delays.¹

¹ See H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395, 3403 ("[t]he conferees recognize that [NEPA] has been used in some cases to delay and ultimately frustrate base closures, and support the narrowing of its applicability for closures and realign-

The 1988 Act was not a permanent mechanism for closing and realigning military installations, but was rather a one-time exception to the process set forth in the 1977 legislation. In January 1990, in actions governed only by the 1977 Act, the Secretary of Defense proposed another round of closures. Members of Congress voiced concern about the Secretary's decisionmaking having "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) ("House Conference Report"), *reprinted in* 1990 U.S.C.C.A.N. 3110, 3257. Moreover, House conferees later noted that base closures and realignments under the 1977 legislation took "a considerable period of time and involve[d] numerous opportunities for challenges in court." House Conference Report at 705, 1990 U.S.C.C.A.N. at 3257.

Congress subsequently enacted the Defense Base Closure and Realignment Act of 1990. Section 2901 of this Act declares that the law's purpose "is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Pub. L. No. 101-510, § 2901 (b), 104 Stat. 1808 (1990).² The Act, which governs three rounds of base closures (in 1991, 1993, and 1995), retains the basic features of the 1988 Act. An independent Commission, to be appointed by the President with the advice and consent of the Senate, is to meet in each of the three years. § 2902(a), (e).

ments under this act. However, they also believe that the NEPA goals of public disclosure and clear identification of potential adverse impacts . . . should be protected").

² In the interest of brevity, citations to the Act will hereinafter be limited to the section number only.

The Secretary of Defense must provide Congress and the Commission with a six-year "force structure plan" that assesses national security threats and the force structure needed to meet them. § 2903(a)(1)-(2). The Act also requires the Secretary to formulate criteria for use in identifying bases for closure or realignment; these criteria must be published in the Federal Register for public notice and comment, and they must be presented to Congress which evaluates and may disapprove them. § 2903(b).

For the first round of base closures, the Act requires the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and final criteria. § 2903(c)(1). The Commission is then charged with reviewing these recommendations and with the preparation of a report for the President containing its assessment of the Secretary's proposal and its own recommendations for base closures. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations, § 2903(d)(1), and authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force structure plan and the final criteria. § 2903(d)(2)(B). In its report to the President, the Commission must justify any departure from the Secretary's list of recommendations. § 2903(d)(3). The Commission is to be assisted in its task by the General Accounting Office ("GAO"), to which the Secretary must give all information used in making his initial recommendations, § 2903(c)(4), and which must report on the Secretary's recommendations to Congress and the Commission, § 2903(d)(5).

Once the Commission has made its recommendations, the Act requires that they be presented to the President for his review. § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. § 2903(e)(2)-(3). If the President approves the Commission's recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the Commission's recommendations in their entirety. §§ 2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. § 2904(b). If the President disapproves the Commission's recommendations in whole or in part, he returns them to the Commission. The Commission reconsiders its recommendations in light of the President's actions and resubmits a revised list for the President's consideration. § 2903(e)(3). If the President does not transmit to Congress an approved list of recommendations by September 1 of any year in which the Commission has transmitted recommendations to the President, the base closure process for that year is terminated. § 2903(e)(5).

The Act contains several important provisions which were absent from predecessor base closure statutes, including, *inter alia*, the requirement that the Commission hold public hearings on the Secretary of Defense's closure recommendations, § 2903(d)(1); the requirement that all meetings of the Commission be open to the public, except where classified information is being discussed, § 2902(e)(2)(A); the requirement that a force structure plan be prepared, § 2903(a); the requirement that final criteria be developed, published and submitted for

congressional consideration, § 2903(b)-(c); the requirement that the Secretary consider all military installations "equally without regard to whether or not the installation has been previously considered or proposed for realignment," § 2903(c)(3); and the requirement that the Secretary transmit to the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments" so that the GAO can analyze the Secretary's recommendations and aid the Commission in its deliberations. §§ 2903(c)(4), 2903(d)(5)(A)-(B).

In April 1991, the Secretary of Defense recommended the closure or realignment of a long list of domestic bases including twelve naval facilities. See 56 Fed. Reg. 15184 (April 15, 1991). Among the naval facilities recommended for closure was the Shipyard. The Commission subsequently held public hearings in Washington, D.C., and Philadelphia. During these hearings the Commission heard testimony from Department of Defense officials, legislators, and other experts. The Commissioners visited the major facilities recommended for closure, including the Shipyard. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted the Commission in its analysis of the Secretary's recommendations.

The Commission ultimately recommended that two of the naval facilities that the Secretary recommended for closure remain open, but concurred with the Secretary's recommendation that the Shipyard be closed. In all, the Commission recommended to the President that 34 installations be closed and 48 realigned. 1991 Defense Base Closure and Realignment Report to the President at vii-viii. President Bush approved

all of the recommendations of the Commission, including the closure of the Shipyard. Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations. On July 30, 1991, the House rejected a proposed resolution of disapproval of the Commission's recommendations by a vote of 364-60, thus authorizing the Secretary to proceed with the closures and realignments. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

Plaintiffs³ filed their original complaint in the district court on July 8, 1991, and an amended complaint on July 19, 1991.⁴ In the amended complaint,

³ Plaintiffs include United States Senators Arlen Specter and Harris Wofford of Pennsylvania, Bill Bradley and Frank R. Lautenberg of New Jersey; Governors Robert P. Casey of Pennsylvania, James J. Florio of New Jersey, and Michael N. Castle of Delaware; Attorneys General Ernest D. Preate, Jr. of Pennsylvania, and Robert J. Del Tufo of New Jersey; United States Representatives Robert E. Andrews, R. Lawrence Coughlin, Peter H. Kostmayer, and Robert A. Borski; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3, and its President Howard J. Landry; the Metal Trades Council, Local 687 Machinists, and its President William F. Reil; and the Planners Estimators Progressman & Schedulers Union, Local No. 2, and its President Ronald Warrington.

⁴ Plaintiffs filed their original complaint before President Bush approved the Commission's recommendations. As we shall see, judicial review is not available at this preliminary stage; nevertheless, because the President made his decision while this suit was pending, we are not presented with a jurisdictional defect. "[I]n this Court, a 'premature appeal taken from an order which is *not final* but which is followed by an order that *is final* may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party.' *Richerson v. Jones*, 551 F.2d 918, 922 (3d

plaintiffs allege that defendants⁵ violated various provisions of the Act.

To summarize briefly the allegations: In Count I plaintiffs allege that the Secretaries of Defense and the Navy violated the Act by withholding information pertinent to the decisionmaking process, by failing to apply the final criteria and force structure plan evenhandedly to all installations, and by failing to implement record-keeping and internal controls. In Count II, plaintiffs charge the Commission with violating the Act by basing its decisions on information supplied by the Navy by not made available to the GAO, Congress or the public, by failing to apply the final criteria and force structure plan evenhandedly, and by ignoring the conclusions of the GAO. Finally in Count III, the Shipyard employee and union plaintiffs charge all defendants with violating their due process rights under the Fifth Amendment to the Federal Constitution by disregarding the procedures set forth in the Act in deciding to close the Shipyard.

Cir. 1977) (emphasis in original)."
Westinghouse Elec. Corp. v. United States, 598 F.2d 759, 766 n.22 (3d Cir. 1979) (noting that court retained jurisdiction where appeal was filed subsequent to preliminary order of Nuclear Regulatory Commission, but before issuance of final NRC order). See also *Dowling v. City of Philadelphia*, 855 F.2d 136, 138 (3d Cir. 1988) (distinguishing situation where notice of appeal is premature under FRAP 4(a)(4)).

⁵ Defendants include the Secretary of the Navy, H. Lawrence Garrett, III; the Secretary of Defense, Richard Cheney; the Defense Base Closure and Realignment Commission and its members James A. Courter, William L. Ball, III, Howard H. Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith, II, and Robert D. Stuart, Jr.

Plaintiffs filed motions for a preliminary injunction and expedited discovery in July. On August 16, defendants filed a motion to dismiss. After a hearing on October 25, 1991, the district court issued its order dismissing the complaint with prejudice on November 1, 1991. The district court found that the legislative history of the Act, as well as the law's purpose to provide for timely closure of military bases, indicate a clear legislative intent to preclude judicial review. *Specter v. Garrett*, No. 91-4322, slip op. at 1-4 (E.D. Pa. November 1, 1991). As an alternative ground for its holding, the court held that this case is one which is "impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government," *id.* at 5, and as a result presents a nonjusticiable political question. *Id.* at 4-7.⁶ Plaintiffs timely filed a notice of appeal.

II.

The threshold issue in this appeal is one of standing. Defendants assert that none of the plaintiffs have standing to litigate the issues raised in the complaint. Because the position of each of the plaintiffs is the same and because we conclude that the Shipyard employees and their union have standing, we need not address the standing of the remaining plaintiffs. See, e.g., *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 485 (D.C. Cir. 1990).

⁶ In addition to the two issues addressed by the district court, the appellees argued that none of the appellants had standing to bring the suit, and that the unions' due process claim failed to state a valid constitutional claim. The district court did not reach these issues.

A person who seeks standing to challenge agency action must show (1) injury in fact and (2) that his interests are arguably within the zone of interests intended to be protected by the statute or constitutional provisions on which the claim is based. *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). A showing of injury in fact is required by the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The injury must be concrete and one which can be addressed by the court should the plaintiff prevail on the merits. *Id.* at 37-38. This test is intended to ensure that complainants have a "personal stake" in the outcome of the proceedings. *Id.*

There can be no doubt that Shipyard employees have a personal stake in these proceedings. If the shipyard is closed, their jobs will be lost. If they prevail on their claim, it is within the power of the district court to grant effective relief. Thus, the Shipyard employees meet the injury in fact requirement.

To satisfy the zone of interests requirement, a plaintiff must "establish that the injury he complains of (*his* aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. —, 110 S. Ct. 3177, 3186 (1990) (emphasis in original). As explained by the Supreme Court,

The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent

to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (footnote omitted). We must thus inquire whether employees of military bases were within the zone of interests meant to be protected by the Act. See *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. —, 111 S. Ct. 913, 918 (1991).

The legislative history of the Act demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live. Because of this sensitivity, Congress sought to ensure that the interest of the employees and their communities would be heard and that the process would be perceived by them as fair. To further this objective, Congress provided for opportunities for public hearings and comment. See, e.g., §§ 2903(d)(1) and 2903(b). It also provided that, if the national interest is found to outweigh those of the local community, economic assistance would be provided to assist in the period of transition. § 2905(a)(B). Finally, because of this congressional

concern reflected in the Act and its legislative history, the base closing criteria established by the Secretary of Defense and left unaltered by the Congress include among the eight factors to be considered "the economic impact on communities." 56 Fed. Reg. 6374 (Feb. 15, 1991).

Given Congress' concern and the steps it took to assure consideration of the interests of employees and their communities, we readily conclude that individual Shipyard employees are within the zone of interest sought to be protected by the Act and that they have standing to press the issues raised in the complaint. We reach a similar conclusion with respect to the unions who are seeking to represent the interests of the members. *International Union, UAW v. Broch*, 477 U.S. 274 (1986).

III.

Section 702 of the Administrative Procedure Act ("APA") provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The APA stipulates that the reviewing court will "set aside agency action . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right . . . ; [or] without observance of the procedure required by law." 5 U.S.C. § 706 (2). Review under the APA is available, however, only "to the extent that . . . statutes [do not] preclude judicial review" and the "agency action is [not] committed to agency discretion by law." 5 U.S.C. § 701(a).

The defendants insist that the district court had no authority under the APA to conduct a review of

the decision to close the Shipyard because the Act precludes judicial review. Litigants making such a contention have a very substantial burden to shoulder. As the Supreme Court stated in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1987) (emphasis added):

We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." [citations omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."

* * * * *

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the [APA], the Senate Committee on the Judiciary remarked:

"*Very rarely* do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a

case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Because "the very essence of civil liberty" is implicated, courts will presume the availability of judicial review unless there is "clear and convincing evidence of a contrary legislative intent." *Bowen*, 476 U.S. at 671, quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). This "clear and convincing" standard is not meant in the strict evidentiary sense, but rather as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

The second category of agency action not subject to judicial review under the APA is that which is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is, in essence, a subset of those cases where the statute passed by Congress precludes judicial review. That is, Congress in some instances evidences an intent that there be no judicial review by requiring an agency or official to make a decision in circumstances under which a reviewing court either would have no law to apply or would find itself confronted with judicially unmanageable issues. Because decisions "committed to agency discretion" are but one example of decisions with respect to which Congress has precluded judicial review, the strong presumption favoring such review applies here as well, and review is available unless it is clear that a reviewing court could not con-

duct a meaningful review. See *Davis Enter. v. United States Envtl. Protection Agency*, 877 F.2d 1181, 1185 (3d Cir. 1989) (presumption of reviewability exists in cases interpreting § 701(a)(2) of APA), *cert. denied*, 493 U.S. 1070 (1990).

The availability of judicial review under the APA is thus a matter of congressional intent⁷ and we must address the reviewability of each of the issues raised by plaintiffs with that fact in mind. Before turning to that task, however, there is one further preliminary matter to be noted. The actions challenged here are not "agency actions" as usually encountered under the APA. The decisionmaking contemplated by the Act is a joint undertaking. The President, exercising the authority which he here exercised, could not close a base that the Commission had not recommended for closure. On the other hand, the Secretary and the Commission can only make recommendations under the Act. If the President fails to approve the Commission's recommendations, the closure process comes to an end for that year. § 2903(e)(5). While the statutory and constitutional violations alleged here result from actions or omissions of the Commissioner and the Secretary of Defense prior to the making of their recommendations, the alleged injury to the plaintiffs did not occur but for a decision of the President and it is from that decision that the plaintiffs necessarily seek relief; it is the implementation of the President's decision that we have been

⁷ It is true, of course, that Congress may limit executive discretion only insofar as it acts within its constitutional grants of enumerated authority. See U.S. Const. art. I, § 8 (enumerating the chief powers granted to Congress). Neither party here, however, claims that Congress has acted beyond that authority in drafting the terms of the Act.

asked to enjoin. Thus, at least in one sense, we are here asked to review a presidential decision.

While the issue remains an open one in this Circuit, the APA may not be applicable to presidential decisionmaking. The Court of Appeals for the District of Columbia Circuit held in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) that the APA does not apply to the President. In *Armstrong*, the court reasoned that, while the APA defines "agency" as an "authority of the government," 5 U.S.C. § 701(b)(1), Congress adopted this broad language to avoid a formalistic definition of the term and did not intend to subject the President to the APA's requirements. 924 F.2d at 289. The court also noted the longstanding practice of not requiring the President to abide by APA rulemaking procedures when issuing executive orders, and the rule that when Congress sets out to restrict presidential action, it must make its intentions clear. *Id.*

Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represents a codification of the common law, 5 Kenneth C. Davis, *Administrative Law* § 28:4 (1984), cited with approval in *Heckler v. Cheney*, 470 U.S. 821, 832 (1985); see also *ICC v. Bhd. of Locomotive Eng's*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); see also *INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) ("[e]xecutive action under legis-

latively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). As explained hereafter, we view the decisionmaking assigned to the President by the Act as clearly committed to his discretion and unreviewable. Congress's intent in this regard is sufficiently clear that our review would be the same whether or not the presumption favoring judicial review under the APA is applicable to presidential decisionmaking. It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

A.

We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b). We say this for two reasons. First, the statutory scheme is inconsistent with there being judicial review prior to this point. The Act sets a very stringent timetable for the various stages of the process it establishes and Congress clearly intended that the final decision on base closing and realignment be reached with alacrity. The Secretary is required to submit his list of recommendations to the Commission by April 15th. § 2903(c). The Commis-

sion is then required to submit its final report to the President by July 1st, ten weeks later. § 2903(d). The President, in turn, is required to make his decision within two weeks, by July 15, 1991. § 2903(e). Finally, the Act allows Congress 45 days in which to disapprove the President's decision. § 2904(b). As the Supreme Court has repeatedly noted, judicial review while an administrative process is on-going is disruptive even where there is no requirement of expedition. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (premature judicial interference with agency processes may prevent agency from functioning efficiently). With a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention. Second, Congress was undoubtedly aware of the rule that the courts may review agency action only if its impact upon plaintiffs is direct and immediate, *see Abbott Labs.*, 387 U.S. at 152. One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decisions are merely preliminary in nature. *See State of Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991) (holding that Congress intended to preclude judicial review of "preliminary decisionmaking activity").

B.

One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure; indeed, plaintiffs do not argue

otherwise. Congress imposed no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources. The Act does not require of the President, as it does of the Secretary and Commission, that he accept the force structure plan and the base-closing criteria. See § 2903(e). If the President believes that the assessment of military need by the Secretary is understated or overstated, he can reject the recommendations for that reason. This leaves a court with no law to apply; i.e., the decision on which bases to close is committed by law to presidential discretion, and judicial review cannot be available. Cf. *Chicago and Southern Airlines v. Waterman S.S. Co.*, 333 U.S. 103 (1948) (under federal statute, applications to engage in foreign air transportation must be approved by President after recommendation by Civil Aeronautics Board; before Presidential approval, no pealable final result exists, and Presidential decision itself is not reviewable because it is committed to his discretion).

C.

This does not end the matter, however. As this court has repeatedly stressed, judicial review is foreclosed only "to the extent that statutes preclude" such review and only "to the extent that agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); see, e.g., *Kirby v. United States Govt. Dep't of Hous. and Urban Dev.*, 675 F.2d 60 (3d Cir. 1982); *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). Thus, the fact that some aspects of a decisionmaking process are determined to be not subject to judicial review does not absolve the courts from the responsibility of determining whether a

clear congressional intention to preclude review exists with respect to other aspects of that same process. There are a number of statutes, for example, in which Congress has clearly intended that there be no review of the ultimate exercise of the agency's discretion, but, at the same time, has anticipated judicial review of compliance with its procedural mandates concerning the process leading up to the ultimate discretionary decision. See, e.g., *Bowen*, 476 U.S. at 675-76 (Medicare statute explicitly limits review of benefit determinations, but challenges to method of determination are not so limited and therefore are reviewable); *Kirby*, 675 F.2d at 67-68 (under Housing Act of 1959, decision by Secretary of HUD to provide funding for housing project is unreviewable, but agency's compliance with procedures in Act is subject to review). Accordingly, we must conduct an issue-specific analysis with congressional intent as our loadstar.

In this context, it is important to note that while Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions,⁸ Congress intended that domes-

⁸ The two other means by which bases may be closed are described in § 2909(c), which provides as follows, in relevant part:

(c) *Exception.*—Nothing in this part affects the authority of the Secretary to carry out—

(1) closures and realignments under title II of Public Law 100-526 [the 1988 Act]; and

(2) closures and realignments . . . carried out for reasons of national security or a military emergency . . .

tic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made. We must keep this congressional objective in mind as we inquire whether and to what extent Congress intended decisions of the Secretary and Commission to be reviewable when someone aggrieved by a base closing alleges that those decisions and the process underlying them deviated from this congressional model.

D.

The defendants' primary argument is that Congress intended to preclude all judicial review of the base closure process other than the limited and here irrelevant review⁹ expressly authorized by the Act.

⁹ The Act does provide for limited review under NEPA, after the closure decisions have been made. *See* § 2905(c) (2). Specifically, NEPA applies to actions of the Secretary during the process of property disposal and during the process of relocating functions from one installation to another. To the extent it applies, NEPA requires any federal agency considering a "a major federal action significantly affecting the quality of the human environment" to prepare an Environmental Impact Statement identifying the environmental consequences of the proposed action and recommends ways to

The defendants acknowledge that there is no express prohibition of judicial review under the Act. They correctly point out, however, that this does not end the inquiry. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345. Defendants contend that the purpose of the Act, its structure and its legislative history are inconsistent with the existence of any judicial review other than in the narrow area expressly authorized. We disagree. While the defendants have pointed to plausible reasons why Congress might have decided to dispense with all judicial review not expressly authorized, nothing in the statute or its legislative history provides a basis for concluding with confidence that it actually decided to do so.

As we shall see, there are some areas of decision-making under the Act in which Congress did not intend the courts to engage in second-guessing. Whether one classifies those areas as "committed to agency discretion" or simply as areas in which Congress intended to preclude judicial review makes no difference; either way one looks at it, the character and context of the decision required by the Act reflects a clear legislative intention that there be no judicial review. On the other hand, there are other

minimize those which are adverse. 42 U.S.C. § 4332(2) (c) (1988). Private parties may bring suit under the APA to challenge violations of NEPA's procedural requirements. *See Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491-92 (9th Cir. 1987).

areas where our analysis leaves us with only the strong presumption favoring judicial review and no clear and convincing rebuttal. To hypothesize the paradigm case, if the Commission decided to dispense with public hearings in the interest of expedition, we could point to no clear and convincing evidence that Congress meant either to commit that decision to the Commission's discretion or otherwise to preclude judicial review of it.

Defendants purport to find a host of clear and convincing evidence of review preclusion in the Act and its legislative history. We will comment only on their three most plausible arguments: those pertaining to the timetable established by the Act, its express provision for limited NEPA review, and the cryptic legislative history concerning judicial review.

As we have noted, we agree with the proposition that the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close. However, we see little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decisionmaking progress and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time-consuming, *see* § 2905 (governing implementation of the approved list); bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental actions involving far greater exigency. Finally, we

know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans and to the importance of public confidence in the integrity of the decisionmaking process. *See* H.R. Rep. No. 665, 101st Cong., 2d Sess. 385 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3078. In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme.

Defendants also contend that congressional intent to preclude judicial review, in particular review of procedural compliance with the Act, can be inferred from the Act's limitation of NEPA review. § 2905. Defendants point out that NEPA claims have been used to delay earlier base closure; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, "[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute." *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977). In short, we conclude that § 2905 (c) does not constitute clear evidence of congress-

sional intent with respect to all judicial review under the Act.¹⁰

Finally, the defendants argue that an intent to preclude judicial review is discernable from the legislative history of the Act. In particular, they point to a paragraph in the House Conference Report which addresses the question of judicial review:

The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for "the conduct of military or foreign affairs functions." An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the [APA] dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the [APA], no final agency action occurs in the case of various actions required under the base closure process contained in this

¹⁰ Although they did not do so, defendants might have argued that by allowing a very limited class of NEPA claims (§ 2905(c) (2) declares that NEPA "shall apply to actions of the Department of Defense . . . during the process of property disposal, and . . . during the process of relocating") but nowhere else allowing for judicial review, Congress expressed its intent to preclude all other forms of review. But we find this argument, too, ultimately unpersuasive. The mere failure to specify the availability of most forms of judicial review is not enough to overcome the strong presumption that this review may be had. See *State of Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) ([n]othing much can be inferred from the fact that Congress did not specify a method for judicial review . . . , even though earlier [in the statute] it had specified such a method).

bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), [sic.] the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), [sic.] the decision of the President under section 2803(e), [sic.] and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

House Conference Report at 705, 1990 U.S.C.C.A.N. at 3258. The district court concluded that "[t]his passage . . . expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act." *Specter*, slip op. at 3. We disagree.

This passage is at best ambiguous. A fair reading reveals only an intent to preclude judicial review to the extent that there is not yet "final agency action" to review.¹¹ On its face, this paragraph does not

¹¹ The reference in this passage to the APA's military affairs exception is especially mystifying. This exception to the general rulemaking and adjudication provisions in Chapter 5 of the APA, 5 U.S.C. §§ 553 and 554, gives agencies involved in military decisions discretion to determine how much public participation, if any, will be available before a final rule is issued, and what evidence will be heard (and by whom) during an agency hearing. The military affairs exception does not, however, determine whether a certain agency action is final within the meaning of Chapter 7 of the APA, 5 U.S.C. § 701 et seq., which governs judicial review.

claim that the Act itself forecloses any judicial review. Its only assertion is that the *APA* will preclude *some* judicial review and the only rationale given for the limited preclusions it contemplates under the *APA* is the absence of finality. The first three "specific actions" in the following list of illustrative actions that "would not be subject to judicial review" each lack finality and thus fit comfortably with the reading we find most plausible. The reference to the last two unreviewable "specific actions," the President's action on the Commission's recommendation and the Secretary's action in carrying out the ultimate decisions, concededly do not fit as well. At some point both of these types of actions become final. Nevertheless, to the extent the inclusion of reference to these actions is significant at all,¹² they do not provide us with clear evidence that Congress intended to preclude all judicial review not expressly authorized. If Congress anticipated that these particular actions would not be reviewable, it is far more reasonable to attribute this to the fact that both types of actions are clearly committed by the Act to the discretion of the decisionmaker.

Because we find no clear evidence of a congressional intent to preclude all judicial review other than the limited *NEPA* review, we reject defendants' primary argument.

We recognize that our conclusion that judicial review is not altogether precluded means that there

¹² The inclusion of the Secretary's action under § 2905 as "not . . . subject to judicial review" provides further support for the theory that this paragraph reflects little more than imprecise staff work. The Secretary's actions under § 2905 are the only actions under the Act that are expressly made subject to judicial review.

may be cases in which the challenged agency action will be found to fall short of or be inconsistent with the standards of the Act. We hasten to add that such a finding, if and when made, will not necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all of the surrounding circumstances.¹³ Thus, judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one.

E.

Having rejected the thesis that all judicial review is precluded, we now turn to the specific agency actions challenged by the plaintiffs and attempt to determine with respect to each allegation whether or not there is clear and convincing evidence of a congressional intent that there be no judicial review.

¹³ Accordingly, it is unwise to speculate about the appropriate form of a remedy without knowing the character of and circumstances surrounding the violation. We do not agree, however, that affording judicial relief would necessarily frustrate Congress's intent to have presidential and congressional action only in the context of a "single package." As we shall see, any remedy afforded in this case would be limited to requiring further process in accordance with the provisions of the Act. Any such additional process could and should be afforded on an expedited basis. If the affording of that further process does not alter the recommendations of the Commission, reconsiderations by the President or Congress might be unnecessary. If that further process would alter the Commission's recommendations, reconsideration of the entire list of recommendations by the President and Congress in accordance with the limited timetable of the Act might be both feasible and appropriate.

Count I, it will be recalled, focuses on alleged deficiencies in the performances of the Secretaries of Navy and Defense.

The Secretary of Defense is required by the Act (a) to develop a force structure plan forecasting military need, (b) to identify criteria to be applied in determining which bases should and should not remain to meet that need, and (c) to formulate specific recommendations by applying that plan and those criteria to the current deployment of military resources throughout the country. § 2903(a)-(c). The Act makes no reference to the Secretary of the Navy and places no restrictions on the Secretary of Defense with respect to his sources of data or advice.

The plaintiffs challenge the decisionmaking process of the Secretary of Defense in fulfilling the above assignments. They allege, *inter alia*, that his force structure plan "lacked sufficient detail"; that his specific recommendations were based on inadequate data; and that he had "decided" to close the Shipyard before developing the criteria and manipulated the criteria so as to justify that result, in violation of § 2903(c)(3) (requiring Secretary to consider all domestic installations "equally without regard to whether [they had] previously been considered for closure"). In addition, plaintiffs allege that the Secretary of Defense relied on advice and data from the Secretary of the Navy that was inadequate, insufficiently explained, and inadequately documented.

We do not think Congress intended for the courts to review this kind of challenge to action under the Act. We say this primarily for two reasons. First, the Secretary's recommendations are clearly committed to his discretion under the Act. While those recommendations are required to be based on the

force structure plan and the base closing criteria and thus, in one sense, there are standards to be applied, the Secretary was assigned the task of formulating those standards because that task required military and other expertise.¹⁴ So, too, do the tasks of applying those standards to the circumstances of each installation and of establishing priorities among them. Review of the Secretary's performance of these tasks

¹⁴ The final criteria, for example, are reported in the Federal Register as follows:

In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:

Military Value

1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.
2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.
3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.
4. The cost and manpower implications.

Return on Investment

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

Impacts

6. The economic impact on communities.
7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel.
8. The environmental impact.

would necessarily present issues that simply are not "judicially manageable." In comparable circumstances, courts have concluded, based on the unmanageable nature of the issues that would be presented, that Congress anticipated no judicial review. See *Heckler*, 470 U.S. at 830 ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'").

In *National Federation of Federal Employees v. United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) ("*NFFE*"), the Court of Appeals for the District of Columbia was asked to review the decisions of the Commission and the Secretary to close domestic military bases under the 1988 Base Closure Act, the predecessor of the 1990 Act which involved no presidential action. The court concluded that Congress intended no judicial review and we find ourselves in agreement with its reasoning:

[T]he problem is not that the Act is devoid of criteria; . . . [the Act] sets forth nine specific criteria to be considered in making base closing decisions. Rather the rub is that the subject matter of those criteria is not "judicially manageable." . . . [J]udicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy. Such decisions are better left to those more expert in issues of defense.

The second, related ground for our conclusion that Congress contemplated no judicial review of these kinds of decisions, is Congress' provision of alternative methods of review. Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis. It decided to put these questions to rest and guarantee the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission, and the GAO. These two entities are charged with the assessment of the Secretary's application of the criteria and the force structure plan. Given the nature of this task, it seems clear to us that an additional review by the courts would not contribute to public confidence in this part of the process and accordingly, we doubt that Congress intended an additional level of review.

One further comment is in order in connection with this category of issues. Plaintiffs argue that it takes no military expertise to make a finding of historic fact as to whether the Secretary prejudged the relevant issue by deciding to close the Shipyard prior to establishing the criteria. We conclude that this is an oversimplification. When Congress called upon the Secretary to make recommendations, it was, of course, aware that he necessarily had given prior thought to the subject of base closures. It thus could not have considered prior thinking on the subject or even prior tentative decisionmaking to be a disqualifying fact. Surely, Congress intended nothing more of the Secretary than that he give meaningful, fresh consideration with respect to any issues previously visited. This is significant because judicial review of whether the Secretary has taken a meaningful fresh look necessarily presents the same kind of judicially

unmanageable issues as a review to determine the adequacy of the data utilized by the Secretary.

The Act also provides that the "Secretary shall make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures." § 2903(c)(4). The Act thus appears to contemplate that the Commission and the GAO will have access to the Secretary's data base so that they can evaluate his recommendations. The plaintiffs, we think, charge that the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations. If this is what the plaintiffs claim, we conclude that their claim is judicially reviewable. Judicial review of that claim presents the kind of issues with which courts have traditionally dealt and we perceive no other evidence of a congressional intent to preclude judicial review of that claim. Indeed, such a review seems entirely consistent with Congress' desire to assure the integrity of the decisionmaking processes. Accordingly, the presumption favoring judicial review must prevail with respect to this category of issues.

We admit to some confusion, however, as to whether the plaintiffs are complaining about the failure to transmit the data, or the adequacy of the data to support the recommendations. Based on the foregoing analysis, the former is reviewable by a court, the latter is not. Similar ambiguity can be found in several other of the claims here. For example, plaintiffs charge the Secretary with having failed to publish in the Federal Register as required by the Act "a summary of the selection process" and "a justifi-

cation for each recommendation." Complaint at 48. If the point here is that there was no publication and the Act required it, this is clearly a reviewable claim. If the point is that the Act requires individual justification and there were none, this again is reviewable. On the other hand, if the point is that the justifications were unpersuasive or inadequately detailed, this is not a judicially reviewable allegation.

F.

Turning to Count II, the Act requires the Commission to apply the force structure plan and criteria to the current deployment of military forces and make an independent judgment about the Secretary's recommendations. The plaintiffs challenge the decisionmaking process by which the Commission fulfilled this assignment. They charge, for example, that the Commission failed to consider all of the Navy installations equally without regard to previous consideration for closure, that it failed to insist on adequate help from the GAO, that it accepted the recommendation of the Secretary with respect to the Shipyard even though the GAO had concluded that the Navy's decisionmaking was inadequately documented, that it (the Commission) utilized unpublished criteria, and that it failed to apply the published criteria equally to all installations.

We conclude that each of these challenges go to the merits of the recommendations of the Commission and that the merits of those recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary. We are again in agreement with the court in *NFFE* that the issues raised by a review of the Commis-

sion's recommendations are not judicially manageable ones. We note as well that under the Act the President and Congress review the Commission's recommendations, and both are better suited to the task than are the courts.

The Act does, however, require the Commission to hold public hearings, § 2903(d)(1), and the plaintiffs contend that the Commission failed to do so. Here again we are not certain we understand plaintiffs' argument, but if it is that the Act requires the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy, we believe their contention is judicially reviewable. In so holding, we do not decide that the Act does so require or that a remedy is available under the circumstances of this case even if it does.¹⁵

¹⁵ Plaintiffs also argue that the Navy concealed all evidence favorable to the Shipyard and when the plaintiffs later obtained some of this information and called it to the Commission's attention, the Commission failed to reopen its public hearings to receive that information. This is said to violate § 2903(d)(1) which requires the Commission to hold hearings. If the argument is that § 2903(d)(1) required the Commission to receive all relevant information even that tendered after the close of a duly noticed hearing, judicial review of that claim seems to us entirely consistent with the congressional intent reflected in the Act and its legislative history. By so holding, we do not, of course, endorse the proposition that the Commission's failure to reopen its hearings was in conflict with § 2903(d)(1). Plaintiffs also appear to contend that the Navy's concealment of evidence favorable to the Shipyard violated § 2903(c)(4) of the Act which requires the Secretary of Defense to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recom-

In sum, we conclude that the presumption favoring judicial review is rebutted with respect to a majority of plaintiffs' claims by the fact that the issues presented in such a review would be judicially unmanageable. Where the plaintiffs ask the court to substitute its political and military judgment for that of the Secretary and the Commission, their claims are not reviewable. The plaintiffs do, however, ask for judicial review of issues that the judiciary is entirely competent to address. With respect to those issues we find the presumption in favor of judicial review unrebutted by the other alleged indicia of congressional intent. While our analysis leaves the district court with a line drawing task, it should provide the guidance necessary for disposition of plaintiffs' numerous challenges.

IV.

As an alternative ground for its decision, the district court held that the political question doctrine prevented it from reviewing the actions of the Secretary and the Commission. Noting that the Act is a carefully wrought compromise which provides both the President and Congress with an opportunity to reject the Commission's recommendations, the court reasoned that this case is "one which [is] impossible for the court to resolve independently without expressing a lack of respect due the coordinate branches

mendations." If this claim is that the Secretary of Defense failed to forward information considered by him in formulating his recommendations, that claim is reviewable. On the other hand, if this claim is that, because of the Navy's concealment, the Secretary of Defense *failed* to consider evidence that he should have considered, judicial review is not available.

of government." *Specter*, slip op. at 5, *alluding to language in Baker v. Carr*, 369 U.S. 186 (1962).

The Court in *Baker* described the elements that identify a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.¹⁶ More recently, in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), the Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." The Court also emphasized, however, that "one of the Judiciary's characteristic roles is to interpret statutes" and determine the obligations of the Executive under relevant statutes,

¹⁶ The Court in *Baker* held that an equal protection challenge to the apportionment scheme of the Tennessee General Assembly did not present a nonjusticiable political question.

and "we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*

The authorities cited above clearly demonstrate that, while it is not the role of the courts to disturb policy decisions of the political branches, the question of whether an agency has acted in accordance with a statute is appropriate for judicial review. In particular, we do not read those authorities as precluding judicial review of any of the kinds of issues we have previously identified as judicially reversible. If, for example, the statute requires that a decision of the Commission be based solely on the record transmitted by the Secretary and that produced during the public hearing, the political question doctrine, we conclude, would not bar review.

Defendants defend the district court's decision by pointing out that whichever of plaintiffs' claims one addresses, "the *relief* sought by [them] interferes directly with the policy decision to close the Shipyard and other installations." Brief for Appellees at 37. The fact that judicial review might undermine the Commission's policy choices, however, cannot by itself mean that review is not available. Judicial review of agency action almost always holds the potential to disrupt the agency's policy decisions. *Japan Whaling*, for example, involved a challenge to a decision by the Secretary of Commerce not to certify Japan under the Fishery Conservation and Management Act as acting to the detriment of an international whaling agreement. This certification, if made, would have forced the Secretary to repudiate an existing executive agreement with Japan allowing for a more gradual decrease in that country's commercial whaling. The Court, "cognizant of the interplay be-

tween [the statute] and the conduct of this Nation's foreign relations," nevertheless held the case to present a justiciable question of determining whether the Secretary had met his duty under the statute, "a recurring and acceptable task for the federal courts." 478 U.S. at 230.

Defendants also argue that "the lack of respect that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing judgment on the base closure decision of the Executive branch." Brief for Appellees at 38. While we agree that the Act assigns this role to Congress and that this assignment is highly relevant to some of the judicial review issues posed by this case, we cannot agree that Congress's role under the Act precludes all judicial review. If congressional oversight were alone enough to create a nonjusticiable political question, the doctrine would grow to unmanageable dimensions: Congress "exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." *Armstrong*, 924 F.2d at 292 (quotation omitted) (congressional oversight over agency action does not necessarily indicate intent to preclude judicial review).

Finally, defendants argue that there is "a textually demonstrable constitutional commitment" of the base closing issue "to a coordinate political department." *Baker*, 369 U.S. at 217. That is, decisions concerning military affairs are committed to the political branches under Articles I and II of the Constitution, and the ultimate issue here is the physical disposition of the nation's military forces. Brief for Appellees at

39-40. As plaintiffs point out, however, the fact that one facet of a decisionmaking process involves an exercise of discretion concerning military process affairs does not insulate all aspects of that process from judicial review. *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988) (federal environmental statutes require Navy to obtain state permit before constructing port; Navy enjoined from construction until permit issued). The authorities cited by defendants are not to the contrary; in these cases, the courts were asked to involve themselves in matters well beyond judicial competence. See *Luftig v. McNamara*, 373 F.2d 664 (1967) (private in U.S. Army sought to have Vietnam War declared illegal and unconstitutional), *cert. denied*, 387 U.S. 945 (1967); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (in wake of shootings at Kent State, students sought judicial review and continuing surveillance over training, weaponry, and orders of National Guard).

V.

In Count III of the complaint, the union and Shipyard employee plaintiffs allege that the defendants' disregard of the Act constitutes a violation of their rights under the Fifth Amendment Due Process Clause. They assert "that they possess a property interest under the . . . Act in the Shipyard's continued operation unless and until it is determined, pursuant to a . . . process in accordance with the mandates of the . . . Act, that the Shipyard should be closed." Brief for Appellants at 40. In response, defendants argue that these plaintiffs have no cognizable "property interest" in the operation of the Shipyard.

It is well settled that protectable property interests can arise from a statutory scheme which creates legitimate claims of entitlement to particular benefits. *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). Even where an intent to bestow a benefit on private individuals is clear, however, a statutory requirement that certain procedures be observed before a benefit can be withdrawn does not in itself create a protected property interest. *Olim v. Wakinekonka*, 461 U.S. 238, 249-51 (1983); *Stephany v. Wagner*, 835 F.2d 497, 500 (3d Cir. 1987), *cert. denied*, 487 U.S. 1207 (1988); *see also*, *Hill v. Group Three Housing Dev. Corp.*, 799 F.2d 385, 391 (8th Cir. 1986) (intent to benefit plaintiff not enough to create cognizable property interest). The mere fact that the Shipyard cannot be closed without meeting the requirements of the Act does not mean that Shipyard employees have a valid due process claim when those procedures are not observed. Rather, the dispositive question in deciding whether the statute creates a protectable property interest is whether it places substantive limits on official discretion for the benefit of shipyard workers. *Stephany*, 835 F.2d at 500, *quoting Olim*, 461 U.S. at 249. The statute must contain "explicitly mandatory language, i.e. specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow," in order to create a property interest. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989); Put another way, the complainant "must show that particularized standards or criteria guide the [government's] decisionmakers" in order to claim protection under the due process clause. *Olim*, 461 U.S. at 249 (quotation omitted).

While the Act establishes a specific process for closing military installations, it places no substantive limits on any of the decisionmakers. The Secretary is allowed to develop and publish criteria and a force structure plan, without specific guidance from the statute, and has broad discretion in applying those standards to current domestic deployment of military resources. The Commission also is accorded broad discretion in applying those standards and may accept the Secretary's recommendations even if they deviate substantially from the final criteria and force structure plan. *See* § 2903(d)(2)(B). Finally, the President and Congress, of course, may reject the Commission's recommendations for any reason at all. *See* §§ 2903(e), 2904(b).

In sum, the Act specifies a particular process but does not guarantee a particular outcome. As a result, the unions and the Shipyard employees can identify no legitimate claim to entitlement under the Act and Count III fails to state a due process claim upon which relief could be granted.

VI.

The judgment of the district court is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I join parts I, II, IV, and V of the opinion of the court, but I disagree with the court's decision insofar as it holds that some of the challenged administrative actions are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 and 702.

As the court notes (maj. typescript at 16-17), there is a "general presumption favoring judicial review of administrative action," but this presumption may be overcome by express statutory language, legislative history, or "inferences of intent drawn from the statutory scheme as a whole." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). Assuming that this presumption applies in the present context,¹ I conclude that the legislative history and the statutory scheme, considered together, show that Congress meant to preclude review.²

I.

The legislative history must be viewed in light of the problems that Congress confronted when it en-

¹ The defendants question whether this presumption applies because of the national security ramifications of base closing and realignment decisions.

² The majority states that "at least in one sense, we are here asked to review a presidential decision" (maj. typescript at 20). As I interpret the complaint and the plaintiffs' brief, however, they seek review, not of Presidential action, but of actions taken by the named defendants, i.e., the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and its members. Accordingly, I see no need to decide whether actions of the President are reviewable under the APA or under administrative "common law."

Because the plaintiffs do not appear to seek review of Presidential action and because the defendants' actions would not have affected the plaintiffs if the President had not accepted the Commission's recommendations, it could be argued that the defendants' actions did not constitute "final agency action" under 5 U.S.C. § 704. I see no need to decide this question, however, because I conclude that the defendants' actions are not reviewable on other grounds.

acted the Base Closure and Realignment Acts of 1988 and 1990. Congress undoubtedly recognized that objective and prompt decisions concerning base closings are vitally important, particularly at a time of budgetary problems and rapidly changing defense needs.³ At the same time, Congress was acutely aware that for more than a decade before the passage of these laws, every attempt to close or realign a major base in this country had been blocked by Congress itself or by the courts.⁴ The 1988 and 1990 Acts were devised to clear away the major obstacles that had produced this costly impasse.

One of the chief obstacles targeted by Congress was litigation that had obstructed base closing and realignment efforts. See H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) [hereinafter 1988 Conf. Rep.], reprinted in 1988 U.S. Code Cong. & Admin. News 3403. In 1977, Congress had enacted legislation requiring the Department of Defense to comply with various procedural requirements, including the preparation of an environmental impact statement under the National Environmental Policy Act of 1969 [hereinafter NEPA], before carrying out any major

³ See Defense Base Closure and Realignment Commission, *Report to the President 1991* at v-vi [hereinafter *Commission Report*]; Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331, 336, 358 (1991).

⁴ See, e.g., *Base Closure: Joint Hearings on H.R. 1583 to Establish the Bipartisan Commission on the Consolidation of Military Bases Before the Military Installations and Facilities Subcommittee of the House Committee on Armed Services and Defense Policy Panel*, 100th Cong., 2d Sess. 349 (1988) (statement of Rep. Arme) [hereinafter *Joint Hearings*]; *Commission Report* at 1-4.

base closing or realignment. 10 U.S.C. § 2687(b) (1)-(3) (Supp. I 1977). In some instances, NEPA challenges had dragged on in the courts for years and had successfully blocked the closing of assertedly obsolete and unneeded bases. *See* 1988 Conf. Rep. at 23, 1988 U.S. Code Cong. & Admin. News at 3403. Both the 1988 and 1990 Acts dealt directly with this specific problem by generally prohibiting NEPA review.⁵ While we are not concerned with NEPA review in this case, this experience is nevertheless instructive for present purposes. It demonstrates that Congress, anxious to remove the impediments that had effectively prevented base closings and realignments for more than a decade, was keenly aware how litigation concerning procedural requirements could be successfully used to stall and ultimately defeat base closing plans.

Unfortunately, while Congress expressly addressed the problem of NEPA review in the body of the 1988 and 1990 Acts, Congress did not confront the question of APA review in the same clear and direct manner. Instead, Congress relegated this question to discussion in the Conference Report. H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706 (1990) [hereinafter 1990 Conf. Rep.] *reprinted in* 1990 U.S. Code Cong. & Admin. News 3258. Moreover, the relevant passage in the Conference Report, which is set out in full in the court's opinion (majority typescript at 29), is not a model of clarity, as the majority points

⁵ Base Closure and Realignment Act of 1988, Pub. L. No. 100-526 § 202(b), 208, 102 Stat. 2623, 2627 (1988) [hereinafter 1988 Act]; Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2905(c) (1), 104 Stat. 1808-19 [hereinafter 1990 Act].

out (*id.* at 30-31). The passage in the report jumbles together several separate administrative law concepts—the military affairs exception to the APA's general rulemaking and adjudication provisions (5 U.S.C. §§ 553(a)(1), 554(a)(4)), the concept of final agency action (5 U.S.C. § 704), and the availability of judicial review (5 U.S.C. §§ 701(a), 702). No party in this case has been able to provide a fully satisfactory exegesis of this passage—nor can I. Still, I do not think that this passage, particularly when viewed in light of the background recounted above, can be wholly dismissed. The passage does state quite clearly that there would be no APA review of key decisions in the base closing and realignment process, including the President's decision to accept the Commission's package of recommendations and the Secretary of Defense's actions in implementing that package after the 45-day report-and-wait period. Because the issuance of the Commission's package is not included in this list, I agree with the majority that this passage alone is not enough to overcome the strong presumption in favor of judicial review. Nevertheless, I believe that this passage, despite its ambiguities, provides support for the proposition that Congress did not want APA review to interfere with its detailed base closing and realignment scheme.⁶

⁶ *See also* [sic] Cong. Rec. H100143 (daily ed. Nov. 13, 1991) (in recommending certain amendments to the 1990 Act, the conferees on the 1991 amendments "reaffirm view, expressed in the [Conference Report on the 1990 Act] that actions taken under the Act . . . would not be subject to judicial review."); 137 Cong. Rec. S17411 (daily ed. Nov. 21, 1991) (statement of Sen. Nunn that the conferees' 1991 statement had the same meaning as the passage in the 1990 Conference Report).

II.

"[T]he inferences of intent drawn from [this] scheme" (*Block*, 467 U.S. at 349) point clearly toward the same conclusion. This innovative scheme was designed to obviate the institutional impediments that were thought to have contributed to the decade-long impasse regarding base closings and realignments. Under this scheme, an independent, bipartisan Defense Base Closure and Realignment Commission was created to formulate a package of recommended closings and realignments. 1990 Act § 2902. After receiving submissions from the Department of Defense, the Commission must draw up and send its package of recommendations to the President by July 1 of the year in question. *Id.* § 2903(a)-(d). Within a short time—by July 15—the President must choose between two options: (a) he may approve the entire package and transmit it to Congress or (b) he may disapprove the package in whole or in part and send it back to the Commission for reconsideration. *Id.* § 2903(e). If the President selects the first option and approves the package, Congress may disapprove the entire package by joint resolution within 45 days. *Id.* § 2904(b). If Congress fails to do so, all of the slated closings and realignments may be carried out. *Id.*

If the President selects the second option and sends the package of recommendations back to the Commission, the Commission must issue a revised package by August 15. *Id.* § 2903(c)(3). The President may then approve or disapprove the entire revised package. *Id.* § 2903(e)(4). If he approves, the package is sent to Congress, and the procedure just described is followed. If he disapproves, the process ceases. *Id.* § 2903(e)(5).

This scheme was designed to eliminate at least three obstacles that had thwarted past efforts to close bases. First, the scheme sought to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress. The legislative history makes it abundantly clear that speed and finality were regarded as indispensable components of the new scheme. The House Conference Report stated that one of the main defects in the prior procedures was that "[c]losures and realignments [have] taken a considerable period of time and [have] involved numerous opportunities for challenges in court." 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News 3257. The Report added that the new scheme was intended to expedite this process.⁷ Representative Les Aspin, the chairman of the House Armed Services Committee and one of the sponsors of the 1988 Act,⁸ reiterated the same point, stating that the new plan was intended to streamline current law on base closures to allow for expeditious closure of bases once the decision to close had been fully reached under the process." 137 Cong. Rec. H6007 (daily ed. July 31, 1991). Representa-

⁷ The Report stated (1990 Conf. Rep. at 707, 1990 U.S. Code Cong. & Admin. News at 3257): "A new process involving an independent, outside commission will permit base closure to go forward in a prompt and rational manner. . . . The new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment."

⁸ H.R. Rep. No. 100-1071, pt. I, 100th Cong., 2d Sess. 8 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3355, 3357.

tive Dick Armey, one of the architects of the new scheme,⁹ stated on the House floor:

[O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closings were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base were greatly harmed by the persistent uncertainty.

Under this procedure, however, all the communities affected [have] a chance to thoroughly make their case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

Id. at H6008.¹⁰ On another occasion, Representative Armey wrote that "the supporters of obsolete bases . . . by enacting an array of environmental study mandates, advance notice requirements, and gratuitous red tape . . . have simply ground base closings to a halt."¹¹ He went on to explain that after a proposed closing is delayed for years by litigation "the local citizenry and members of Congress are thoroughly aroused, and the political pressures to cancel the clos-

⁹ *Id.*

¹⁰ See also Armey, *Base Maneuvers—The Games Congress Plays with the Military Pork Barrel*, *Joint Hearings* at 30, 35, reprinted from *Policy Review*, Winter 1988, at 70, 75 [hereinafter *Base Maneuvers*].

¹¹ *Base Maneuvers* at 72.

ing order are all but insurmountable."¹² See also *Joint Hearings* at 19 (statement of Rep. Armey); 134 Cong. Rec. H16715 (daily ed. Apr. 13, 1988) (statement of Rep. Armey).

Second, the new scheme was designed to insulate base closing and realignment decisions from actual or apparent influence by partisan and other political considerations. In the past, Executive Branch recommendations had often been criticized and defeated on the ground that particular bases had been doomed or spared based on improper political factors. For example, Representative Armey said that prior base closing decisions had been "contaminated by unworthy political considerations" and that particular bases had been closed or retained in order to punish or reward members of Congress. 137 Cong. Rec. H6008 (daily ed. July 31, 1991).¹³ Other members echoed these sentiments.¹⁴ See also *Commission Report* at 1-1, 1-2.

¹² *Id.*

¹³ *Joint Hearings*, at 20-21 (statement of Rep. Armey quoting past statement by Senators Bumpers and Heinz); *id.* at 17 (statement of Rep. Armey) ("To put it bluntly, there is a widespread fear in Congress that an Administration with unrestricted base closure power may use that power as a political weapon to intimidate Congress."); *id.* at 349 (statement of Rep. Armey) ("[T]here is a fear that an Administration may use the threat to close particularly military bases in order to influence the votes of members of Congress."). See also 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News at 3257; H.R. Rep. 100-735 (II), 100th Cong., 2d Sess. 8-9, reprinted in 1988 U.S. Code Cong. & Admin. News at 3370, 3372 [hereinafter 1988 House Report pt. II].

¹⁴ See, e.g., 137 Cong. Rec. H6008 (daily ed. July 31, 1991) (statement of Rep. Weldon) ("I supported the base closing

The new scheme sought to remove any possible grounds for such charges by transferring the responsibility for recommending closings and realignments to an independent, nonpartisan body. Furthermore, the new scheme recognized that political considerations might creep back into the decisionmaking process if either the President or the Congress was permitted to add particular bases to or remove particular bases from the list formulated by the Commission. The new scheme therefore prohibited any such additions or deletions, restricting the President's and Congress's options to the acceptance or rejection of the Commission's entire list. The House Report on the 1990 Act explained that the "right way" to close bases is to use "a highly respected bipartisan commission [to] recommend bases for realignment

process in the legislation . . . because I wanted to remove [the] politics of the process of closing bases, and I think to a large extent we have done that from the standpoint of Republican versus Democratic politics"); *id.* at H6010 (statement of Rep. Snowe) ("This process was intended to remove the supposed evil of congressional politics from the base closure process"); *id.* at H6038 (statement of Rep. Fazio) ("Many serious and legitimate concerns were raised as to the political nature of the base closure recommendations when Secretary Cheney released his first list in January 1990. Because of these concerns, Congress included legislation as part of the fiscal year 1991 Defense authorization bill which put in place a clear, objective, and fair process for closing bases"). The legislative history of the 1988 Act reflected similar views. See 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372 ("[P]olitical pressure has thwarted attempts to effect savings and efficiencies by shutting down unneeded facilities, and the resulting belief that only by creating an expedited and automatic mechanism, insulated from the political pressures of the normal legislative process, will such savings be achieved.").

or closure based on a number of neutral and widely endorsed criteria" and to give Congress the opportunity to accept or reject the recommendations as a whole. H.R. Rep. No. 655, 101st Cong., 2d Sess. 341, reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 3067. Likewise, the House Report on the 1988 Act explained: "[A] major concern underlying the 'Base Closure Commission' proposal is that political pressures in the Congress could block the closing of particular facilities. One important element of the Committee's procedure that is designed to allay that concern is the provision that the resolution may not be amended by the Congress." 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372.

Third, the new scheme apparently reflected the belief that Congress, although previously unable to agree on any major base closings, would find it easier to approve a package of recommended closings that had to be accepted or rejected in its entirety. Chairman Aspin repeatedly emphasized this point in public statements,¹⁵ and his predictions proved accurate. While no major closing or alignment had been ac-

¹⁵ See Morrison, *Caught Off Base*, 21 Nat'l J. 801, 801 (1989) (quoting Rep. Aspin); Mills, *Base Closings: The Political Pain Is Limited*, 46 Cong. Q. Weekly Rep. 3625 (1988) (quoting Rep. Aspin). See also 137 Cong. Rec. H6022 (daily ed. July 31, 1991) (statement of Rep. Holloway); Mills, *Challenge to Base Closings Fizzles on House Floor*, 47 Cong. Q. Weekly Rep. 2062 (1989); Mills, *Pain in Members' Home States Fails to Move Minds on Hill*, 47 Cong. Q. Weekly Rep. 604 (1989); Towell, *Hill Paves Way for Closing Old Base*, 46 Cong. Q. Weekly Rep. 2999 (1988) ("[B]y forcing Congress to deal with the proposal as a package, the new procedure [made] it harder for members to cut deals to protect individual bases in their home district against cutbacks.").

completed since the 1970s, the Commission's 1991 recommendations were approved by the President, and a proposed joint resolution of disapproval lost in the House by an overwhelming margin. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

III.

In my view, judicial review of base closing decisions is inconsistent with this scheme because a successful challenge—i.e., one that at least temporarily invalidates a base closing decision—would thwart the scheme's fundamental objectives.

First, it seems clear that judicial review would undermine the concepts of speed and finality that Congress regarded as vital parts of its plan. See *Morris v. Gressette*, 432 U.S. 491, 503-04 (1977). In the vast majority of cases, judicial review could not be completed within the short time limits imposed by the Act. The majority acknowledges (maj. typescript at 17) that "the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close," but the majority "sees little tension between that timetable and judicial review after a final list of bases for closure" has been approved by the President and not disapproved by the Congress.

I disagree. The new scheme crafted by Congress contemplates that a truly "final" decision on a package of closings and realignments would be completed within the short time periods set out.¹⁶ The scheme

¹⁶ In providing for very limited NEPA review—of property disposal and relocation actions to be taken after a final closing or alignment decision (1990 Act § 2905(c)(2))—Congress imposed a very short (60-day) statute of limitations. No

did not contemplate that this "final" decision would then be subject to judicial review, possible reversal, and further action by the Commission, the President, and the Congress.

Furthermore, judicial review of one part of a purportedly "final" package will often implicate other parts of the package. Decisions regarding base closings sometimes involve hard choices concerning the relative merits of comparable bases. (In this case, for example, a major theme in the plaintiffs' complaint is the Philadelphia Naval Yard's claimed superiority over other similar naval yards that the Commission evaluated more highly and therefore recommended be retained.) Thus, if the Commission decides to recommend closure of [sic] base A rather than Base B and the decision on Base A is reversed after judicial review of the Commission's procedures, the decision to recommend retention of Base B will logically be called into question. In this way, judicial review of one part of the "final" package may reopen other parts of the package as well—or require the taxpayers to pay for clearly redundant facilities.

Not only would judicial review after a purportedly "final" decision upset the timetable set out in the Act, but such review would undermine the concept that neither the President nor Congress should be permitted to approve or disapprove the closing of a particular base but should instead be restricted to choosing between acceptance or rejection of the Commission's entire package. If the plaintiffs in this case succeed on their underlying APA claims and the

statute of limitations was prescribed for a suit of the type as issue here. This seems a clear indication that no such suits were contemplated.

Commission is required to conduct further proceedings and issue a new recommendation regarding the Philadelphia Naval Yard, the President and the Congress would then be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base.

In sum, it seems to me that the statutory scheme is grounded on concepts—speed, finality, and limiting the President and the Congress to an all-or-nothing choice on a package or recommendations—that are inconsistent with judicial review under the APA. Certainly I do not suggest that review of the decision regarding the Philadelphia Naval Yard will bring the statutory scheme tumbling down, and I am unable to predict what effect if any the precedent set by this case will have on litigation concerning future attempted closings. I conclude only that judicial review of base closing and realignment decisions is conceptually inconsistent with the innovative scheme enacted by Congress. This analysis, reinforced by the legislative history, leads me to the conclusion that base closing decisions are not reviewable under the APA.

\ A True Copy:

\ Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-485

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY,
ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above Court in this cause is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Franklin v. Massachusetts*, 505 U.S. — (1992).

November 9, 1992

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SUPREME COURT OF THE UNITED STATES

No. 92-485

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY,
ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 9, 1992

The petition herein for writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 91-4322

SEN. ARLEN SPECTER, ET AL.

v.

H. LAWRENCE GARRETT, III,
SECRETARY OF THE NAVY, ET AL.

[Filed November 1, 1991]

MEMORANDUM AND ORDER

BUCKWALTER, J.

I will grant the defendants' motion to dismiss because:

- (a) the statute precludes judicial review; and
- (b) the political question doctrine forecloses judicial intervention.

A. *THE STATUTE PRECLUDES JUDICIAL REVIEW*

Plaintiffs have asserted that their right to judicial review for Counts I and II arises under the Adminis-

trative Procedure Act, 5 U.S.C. §§ 551-706 (1977), hereafter APA.

The presumption of judicial review of federal agency action under the APA is well established. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). This presumption, like all presumptions used in interpreting statutes, may be overcome by the appropriate showing of congressional intent. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). The APA specifically provides two methods for overcoming the presumption of judicial review in § 701(a). For purposes of this case, we are concerned only with the first method in § 701(a)(1), which provides for no judicial review under the APA “to the extent that—(1) statutes preclude judicial review . . .” 5 U.S.C. §§ 701(a)(1) (1977).

In determining whether a statute precludes judicial review, the Supreme Court has instructed courts to look at “specific language or specific legislative history that is a reliable indicator of congressional intent,” “the collective import of legislative and judicial history behind a particular statute,” and “inferences of intent drawn from the statutory scheme as a whole.” *Block*, 467 U.S. at 349. As long as the congressional intent to preclude judicial review is “fairly discernible in the statutory scheme,” the presumption favoring judicial review has been overcome. *Id.* at 351.

Applying these standards, the court finds that the Defense Base Closure and Realignment Act of 1990 precludes judicial review for the following reasons. Initially, specific language in the legislative history of the Act indicates a congressional intent to preclude judicial review. The House Conference Report provides:

The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for “the conduct of military or foreign affairs function.” An action falling within this exception, as the decision to clear and realign bases surely does, is immune from the provisions of the Administrative Procedures Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements, and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan . . . , the issuance of selection criteria . . . , the Secretary of Defense’s recommendation of closures and realignments of military installations . . . , the decision of the President . . . , and the Secretary’s actions to carry out the recommendations of the Commission. . . .

H.R. Conf. Rep. 101-923, 101st Cong., 2d Sess. 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258.

This passage in the legislative history expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act.

Other indicia of statutory intent to preclude judicial review is the Act’s concern with “the timely

closure and realignment of military installations." Section 2901(b). The House Conference Report stated a desire for the base closure process under the 1990 Act to correct the failings of the base closure process under the then existing law, which included that closures and realignments "take a considerable period of time and involve numerous opportunities for challenge in court." H.R. Conf. Rep. 101-923, 101st Cong. 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257. The Report further stated that the new process under the 1990 Act "involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner." *Id.*

This language in the legislative history indicates that there was concern that judicial review of base closures had been preventing the base closure process from moving forward in a timely manner. The desire to correct this shortcoming under the then existing law further supports the contention that no judicial review was contemplated by the 1990 Act. While the arguments proposed by both sides on this issue are extensive, I have written this memorandum in a rather summary fashion in the interest of time, but not at the expense of a thorough analysis of the arguments on both sides. In brief, I find that the intent to preclude judicial review is "fairly discernible in the statutory scheme."

B. THE POLITICAL QUESTION DOCTRINE FORECLOSES JUDICIAL INTERVENTION

"Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, di-

verge, combine, appear and disappear in seemingly disorderliness". *Baker v. Carr*, 369 U.S. 186, 210 (1962).

Based on my own review of cases as well as treatises on the subject, I believe that Justice Brennan's statement in the *Baker* case, *supra*, remains as true today as it was 29 years ago. Nevertheless, the *Baker* case did describe the attributes of a political question and expressed them in the following manner:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In a sense, the invoking of the political question doctrine is no more than a correlative of my first

conclusion that the Defense Base Closure and Realignment Act of 1990 precludes judicial review.

On the other hand, the doctrine can stand by itself, it seems to me, as one which recognizes that in certain cases, the concept of separation of powers strongly suggests that the judiciary should defer in certain controversies to one or both of the other branches of government.

In reviewing the formulations in *Baker*, I felt that the present case represented one which was impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government.

The respect due to the other branches of government comes in part from a recognition that all branches are deeply concerned with conducting their affairs in the manner which is consistent with the constitution. Indeed, all three branches are involved in interpreting it. It is true, of course, that normally the judicial branch undertakes the ultimate review of laws and in so doing will not always agree with the interpretation of the other branches.

Under the political question doctrine, when should the judiciary defer to the other branches' views as opposed to simply undertaking judicial review and stating its own views, whether or not they differ from the other branches?

Unfortunately, there is no particular guidance in case law for determining the answer to that question as the first quotation from *Baker* indicates. The simple answer is, RARELY. Nevertheless, one must view the particular setting in which the question is raised. The case now before me comes with a significantly long history of attempts to close military

bases and the problems resulting from such attempts. The Act of 1990 is the most recent in a series of efforts by Congress to resolve those problems fairly. Among other things, it provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations. As permitted by the Act, both the President and the Congress have approved the recommended base closures. While plaintiffs view defendants' raising of the political question doctrine as specious, I must disagree. Although I view it as a doctrine which should be used sparingly, this case fairly calls for its invocation.

In conclusion, I believe that it would be impossible to undertake judicial review of the decision on base closures made by the duly elected representatives of this country without expressing a lack of the respect due those branches of government.

Based on the foregoing opinion, the following order is entered:

ORDER

AND NOW, this 1st day of November, 1991, it is hereby ORDERED that defendants' Motion to Dismiss is GRANTED; the court enters judgment for the defendants and the plaintiffs' claims are DISMISSED WITH PREJUDICE.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

 No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL No. 2

v.

H. LAWRENCE GARRETT, III, Secretary of the Navy; RICHARD CHENEY, Secretary of Defense; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMEYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL No. 2, APPELLANTS

 SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hutchinson, Judge Nygaard, and Judge Alito would have granted rehearing in banc.

By the Court

/s/ WALTER STAPLETON
Circuit Judge

Dated: June 14, 1993

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2 v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETARY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTMEYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, STAPLETON, MANS-
MANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD, and ALITO, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would have granted rehearing.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

Dated: May 20, 1992

APPENDIX G

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, as amended;* 10 U.S.C. 2687 note (Supp. IV 1992).

"SEC. 2901. SHORT TITLE AND PURPOSE

"(a) **SHORT TITLE.**—This part may be cited as the 'Defense Base Closure and Realignment Act of 1990'.

"(b) **PURPOSE.**—The purpose of this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.

"SEC. 2902. THE COMMISSION

"(a) **ESTABLISHMENT.**—There is established an independent commission to be known as the 'Defense Base Closure and Realignment Commission'.

"(b) **DUTIES.**—The Commission shall carry out the duties specified for it in this part.

"(c) **APPOINTMENT.**—(1) (A) The Commission shall be composed of eight members appointed by the President, by and with the advise and consent of the Senate.

"(B) The President shall transmit to the Senate the nominations for appointment to the Commission—

* See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b) (1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1344-1345, 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608.

"(i) by no later than January 3, 1991, in the case of members of the Commission whose terms will expire at the end of the first session of the 102nd Congress;

"(ii) by no later than January 25, 1993, in the case of members of the Commission whose terms will expire at the end of the first session of the 103rd Congress; and

"(iii) by no later than January 3, 1995, in the case of members of the Commission whose terms will expire at the end of the first session of the 104th Congress.

"(C) If the President does not transmit to Congress the nominations for appointment to the Commission on or before the date specified for 1993 in clause (ii) of subparagraph (B) or for 1995 in clause (iii) of such subparagraph, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

"(2) In selecting individuals for nominations for appointments to the Commission, the President should consult with—

"(A) the Speaker of the House of Representatives concerning the appointment of two members;

"(B) the majority leader of the Senate concerning the appointment of two members;

"(C) the minority leader of the House of Representatives concerning the appointment of one member; and

"(D) the minority leader of the Senate concerning the appointment of one member.

“(3) At the time the President nominates individuals for appointment to the Commission for each session of Congress referred to in paragraph (1) (B), the President shall designate one such individual who shall serve as Chairman of the Commission.

“(d) TERMS.—(1) Except as provided in paragraph (2), each member of the Commission shall serve until the adjournment of Congress sine die for the session during which the member was appointed to the Commission.

“(2) The Chairman of the Commission shall serve until the confirmation of a successor.

“(e) MEETINGS.—(1) The Commission shall meet only during calendar years 1991, 1993, and 1995.

“(2) (A) Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public.

“(B) All the proceedings, information, and deliberations of the Commission shall be open, upon request, to the following:

“(i) The Chairman and the ranking minority party member of the Subcommittee on Readiness, Sustainability, and Support of the Committee on Armed Services of the Senate, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

“(ii) The Chairman and the ranking minority party member of the Subcommittee on Military Installations and Facilities of the Committee on Armed Services of the House of Representatives, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

“(iii) The Chairmen and ranking minority party members of the Subcommittees on Military Construction of the Committees on Appropriations of the Senate and of the House of Representatives, or such other members of the Subcommittees designated by such Chairmen or ranking minority party members.

“(f) VACANCIES.—A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the unexpired portion of the term for which the individual's predecessor was appointed.

“(g) PAY AND TRAVEL EXPENSES.—(1) (A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

“(B) The Chairman shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

“(2) Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

“(h) DIRECTOR OF STAFF.—(1) the Commission shall, without regard to section 5311(b) of title 5, United States Code, appoint a Director who has not

served on active duty in the Armed Forces or as a civilian employee of the Department of Defense during the one-year period preceding the date of such appointment.

“(2) The Director shall be paid at the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

“(i) STAFF.—(1) Subject to paragraphs (2) and (3), the Director, with the approval of the Commission, may appoint and fix the pay of additional personnel.

“(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

“(3) (A) Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense.

“(B) (i) Not more than one-fifth of the professional analysts of the Commission staff may be persons detailed from the Department of Defense to the Commission.

“(ii) No person detailed from the Department of Defense to the Commission may be assigned as the lead professional analyst with respect to a military department or defense agency.

“(C) A person may not be detailed from the Department of Defense to the Commission if, within 12 months before the detail is to begin, that person par-

ticipated personally and substantially in any matter within the Department of Defense concerning the preparation of recommendations for closures or realignments of military installations.

“(D) No member of the Armed Forces, and no officer or employee of the Department of Defense, may—

“(i) prepare any report concerning the effectiveness, fitness, or efficiency of the performance on the staff of the Commission of any person detailed from the Department of Defense to that staff;

“(ii) review the preparation of such a report; or

“(iii) approve or disapprove such a report.

“(4) Upon request of the Director, the head of any Federal department or agency may detail any of the personnel of that department or agency to the Commission to assist the Commission in carrying out its duties under this part.

“(5) The Comptroller General of the United States shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

“(6) The following restrictions relating to the personnel of the Commission shall apply during 1992 and 1994:

“(A) There may not be more than 15 persons on the staff at any one time.

“(B) The staff may perform only such functions as are necessary to prepare for the transition to new membership on the Commission in the following year.

“(C) No member of the Armed Forces and no employee of the Department of Defense may serve on the staff.

“(j) OTHER AUTHORITY.—(1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

“(2) The Commission may lease space and acquire personal property to the extent funds are available.

“(k) FUNDING.—(1) There are authorized to be appropriated to the Commission such funds as are necessary to carry out its duties under this part. Such funds shall remain available until expended.

“(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100-526 [set out below]. Such funds shall remain available until expended.

“(l) TERMINATION.—The Commission shall terminate on December 31, 1995.

“(m) PROHIBITION AGAINST RESTRICTING COMMUNICATIONS.—Section 1034 of title 10, United States Code, shall apply with respect to communications with the Commission.

“SEC. 2903. PROCEDURE FOR MAKING RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS

“(a) FORCE-STRUCTURE PLAN.—(1) As part of the budget justification documents submitted to Congress in support of the budget for the Department

of Defense for each of the fiscal years 1992, 1994, and 1996, the Secretary shall include a force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the six-year period beginning with the fiscal year for which the budget request is made and of the anticipated levels of funding that will be available for national defense purposes during such period.

“(2) Such plan shall include, without any reference (directly or indirectly) to military installations inside the United States that may be closed or realigned under such plan—

“(A) a description of the assessment referred to in paragraph (1);

“(B) a description (i) of the anticipated force structure during and at the end of each such period for each military department (with specifications of the number and type of units in the active and reserve forces of each such department), and (ii) of the units that will need to be forward based, with a justification thereof) during and at the end of each such period; and

“(C) a description of the anticipated implementation of such force-structure plan.

“(3) The Secretary shall also transmit a copy of each such force-structure plan to the Commission.

“(b) SELECTION CRITERIA.—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military

installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that opportunity in the publication required under the preceding sentence.

"(2)(A) The Secretary shall, by no later than February 15, 1991, publish in the Federal Register and transmit to the congressional defense committees the final criteria to be used in making recommendations for the closure or realignment of military installations inside the United States under this part. Except as provided in subparagraph (B), such criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15, 1991.

"(B) The Secretary may amend such criteria, but such amendments may not become effective until they have been published in the Federal Register, opened to public comment for at least 30 days, and then transmitted to the congressional defense committees in final form by no later than January 15 of the year concerned. Such amended criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before February 15 of the year concerned.

"(c) DOD RECOMMENDATIONS.—(1) The Secretary may, by no later than April 15, 1991, March 15, 1993, and March 15, 1995, publish in the Federal Register and transmit to the congressional defense committees and to the Commission a list of the military installa-

tions inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned.

"(2) The Secretary shall include, with the list of recommendations published and transmitted pursuant to paragraph (1), a summary of the selection process that resulted in the recommendation for each installation, including a justification for each recommendation.

"(3) In considering military installations for closure or realignment, the Secretary shall consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department.

"(4) In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

"(5)(A) Each person referred to in subparagraph (B), when submitting information to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation, shall certify that such information is accurate and complete to the best of that person's knowledge and belief.

"(B) Subparagraph (A) applies to the following persons:

"(i) The Secretaries of the military departments.

“(ii) The heads of the Defense Agencies.

“(iii) Each person who is in a position the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations, as designated in regulations which the Secretary of Defense shall prescribe, regulations which the Secretary of each military department shall prescribe for personnel within that military department, or regulations which the head of each Defense Agency shall prescribe for personnel within that Defense Agency.

“(6) In the case of any information provided to the Commission by a person described in paragraph (5)(B), the Commission shall submit that information to the Senate and the House of Representatives to be made available to the Members of the House concerned in accordance with the rules of that House. The information shall be submitted to the Senate and the House of Representatives within 24 hours after the submission of the information to the Commission. The Secretary of Defense shall prescribe regulations to ensure the compliance of the Commission with this paragraph.

“(d) REVIEW AND RECOMMENDATIONS BY THE COMMISSION.—(1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations.

“(2)(A) The Commission shall, by no later than July 1 of each year in which the Secretary transmits recommendations to it pursuant to subsection (c), transmit to the President a report containing the

Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations inside the United States.

“(B) Subject to subparagraph (C), in making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

“(C) In the case of a change described in subparagraph (D) in the recommendations made by the Secretary, the Commission may make the changes only if the Commission—

“(i) makes the determination required by subparagraph (B);

“(ii) determines that the change is consistent with the force-structure plan and final criteria referred to in subsection (c)(1);

“(iii) publishes a notice of the proposed change in the Federal Register not less than 30 days before transmitting its recommendations to the President pursuant to paragraph (2); and

“(iv) conducts public hearings on the proposed change.

“(D) Subparagraph (C) shall apply to a change by the Commission in the Secretary's recommendations that would—

“(i) add a military installation to the list of military installations recommended by the Secretary for closure;

“(ii) add a military installation to the list of military installations recommended by the Secretary for realignment; or

“(iii) increase the extent of a realignment of a particular military installation recommended by the Secretary.

“(3) The Commission shall explain and justify in its report submitted to the President pursuant to paragraph (2) any recommendation made by the Commission that is different from the recommendations made by the Secretary pursuant to subsection (c). The Commission shall transmit a copy of such report to the congressional defense committees on the same date on which it transmits its recommendations to the President under paragraph (2).

“(4) After July 1 of each year in which the Commission transmits recommendations to the President under this subsection, the Commission shall promptly provide, upon request, to any Member of Congress information used by the Commission in making its recommendations.

“(5) The Comptroller General of the United States shall—

“(A) assist the Commission, to the extent requested, in the Commission’s review and analysis of the recommendations made by the Secretary pursuant to subsection (c); and

“(B) by no later than April 15 of each year in which the Secretary makes such recommendations, transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary’s recommendations and selection process.

“(e) REVIEW BY THE PRESIDENT.—(1) The President shall, by no later than July 15 of each year in which the Commission makes recommendations under subsection (d), transmit to the Commission and to the Congress a report containing the President’s approval or disapproval of the Commission’s recommendations.

“(2) If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress, together with a certification of such approval.

“(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval. The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

“(4) If the President approves all of the revised recommendations of the Commission transmitted to the President under paragraph (3), the President shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval.

“(5) If the President does not transmit to the Congress an approval and certification described in paragraph (2) or (4) by September 1 of any year in which the Commission has transmitted recommendations to the President under this part, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

"SEC. 2904. CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

"(a) IN GENERAL.—Subject to subsection (b), the Secretary shall—

"(1) close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e);

"(2) realign all military installations recommended for realignment by such Commission in each such report;

"(3) initiate all such closures and realignments no later than two years after the date on which the President transmits a report to the Congress pursuant to section 2903(e) containing the recommendations for such closures or realignments; and

"(4) complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignment.

"(b) CONGRESSIONAL DISAPPROVAL.—(1) The Secretary may not carry out any closure or realignment recommended by the Commission in a report transmitted from the President pursuant to section 2903(e) if a joint resolution is enacted, in accordance with the provisions of section 2908, disapproving such recommendations of the Commission before the earlier of—

"(A) the end of the 45-day period beginning on the date on which the President transmits such report; or

"(B) the adjournment of Congress sine die for the session during which such report is transmitted.

"(2) For purposes of paragraph (1) of this subsection and subsections (a) and (c) of section 2908, the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period.

"SEC. 2905. IMPLEMENTATION

"(a) IN GENERAL.—(1) In closing or realigning any military installation under this part, the Secretary may—

"(A) take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design as may be required to transfer functions from a military installation being closed or realigned to another military installation, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for use in planning and design, minor construction, or operation and maintenance;

"(B) provide—

"(i) economic adjustment assistance to any community located near a military installation being closed or realigned, and

"(ii) community planning assistance to any community located near a military in-

stallation to which functions will be transferred as a result of the closure or realignment of a military installation,

if the Secretary of Defense determines that the financial resources available to the community (by grant or otherwise) for such purposes are inadequate, and may use for such purposes funds in the Account or funds appropriated to the Department of Defense for economic adjustment assistance or community planning assistance;

“(C) carry out activities for the purposes of environmental restoration and mitigation at any such installation, and shall use for such purposes funds in the Account;

“(D) provide outplacement assistance to civilian employees employed by the Department of Defense at military installations being closed or realigned, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for outplacement assistance to employees; and

“(E) reimburse other Federal agencies for actions performed at the request of the Secretary with respect to any such closure or realignment, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense and available for such purpose.

“(2) In carrying out any closure or realignment under this part, the Secretary shall ensure that environmental restoration of any property made excess to the needs of the Department of Defense as a result of such closure or realignment be carried out as soon as possible with funds available for such purpose.

“(b) MANAGEMENT AND DISPOSAL OF PROPERTY.—
(1) The Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus real property and facilities located at a military installation closed or realigned under this part—

“(A) the authority of the Administrator to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483);

“(B) the authority of the Administrator to dispose of surplus property under section 203 of that Act (40 U.S.C. 484);

“(C) the authority of the Administrator to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)); and

“(D) the authority of the Administrator to determine the availability of excess or surplus real property for wildlife conservation purposes in accordance with the Act of May 19, 1948 (16 U.S.C. 667b).

“(2) (A) Subject to subparagraph (C), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with—

“(i) all regulations in effect on the date of the enactment of this Act [Nov. 5, 1990] governing the utilization of excess property and the disposal of surplus property under the Federal Property and Administrative Services Act of 1949 [40 U.S.C. 471 et seq.]; and

“(ii) all regulations in effect on the date of this Act governing the conveyance and disposal

of property under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)).

“(B) The Secretary, after consulting with the Administrator of General Services, may issue regulations that are necessary to carry out the delegation of authority required by paragraph (1).

“(C) The authority required to be delegated by paragraph (1) to the Secretary by the Administrator of General Services shall not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.

“(D) The Secretary of Defense may transfer real property or facilities located at a military installation to be closed or realigned under this part with or without reimbursement, to a military department or other entity (including a nonappropriated fund instrumentality) within the Department of Defense or the Coast Guard.

“(E) Before any action may be taken with respect to the disposal at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local government concerned for the purpose of considering any plan for the use of such property by the local community concerned.

“(c) APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—(1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

“(2) (A) The provisions of the National Environmental Policy Act of 1969 shall apply to actions of

the Department of Defense under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated.

“(B) In applying the provisions of the National Environmental Policy Act of 1969 to the processes referred to in subparagraph (A), the Secretary of Defense and the Secretary of the military departments concerned shall not have to consider—

“(i) the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission;

“(ii) the need for transferring functions to any military installation which has been selected as the receiving installation; or

“(iii) military installations alternative to those recommended or selected.

“(3) A civil action for judicial review, with respect to any requirement of the National Environmental Policy Act of 1969 to the extent such Act is applicable under paragraph (2), of any act or failure to act by the Department of Defense during the closing, realigning, or relocating of functions referred to in clauses (i) and (ii) of paragraph (2)(A), may not be brought more than 60 days after the date of such act or failure to act.

“(d) WAIVER.—The Secretary of Defense may close or realign military installations under this part without regard to—

“(1) any provision of law restricting the use of funds for closing or realigning military in-

installations included in any appropriations or authorization Act; and

“(2) sections 2662 and 2687 of title 10, United States Code.

“SEC. 2906. ACCOUNT

“(a) IN GENERAL.—(1) There is hereby established on the books of the Treasury an account to be known as the ‘Department of Defense Base Closure Account 1990’ which shall be administered by the Secretary as a single account.

“(2) There shall be deposited into the Account—

“(A) funds authorized for and appropriated to the Account;

“(B) any funds that the Secretary may, subject to approval in an appropriation Act, transfer to the Account from funds appropriated to the Department of Defense for any purpose, except that such funds may be transferred only after the date on which the Secretary transmits written notice of, and justification for, such transfer to the congressional defense committees; and

“(C) except as provided in subsection (d) proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part.

“(b) USE OF FUNDS.—(1) The Secretary may use the funds in the Account only for the purposes described in section 2905(a).

“(2) When a decision is made to use funds in the Account to carry out a construction project under section 2905(a) and the cost of the project will exceed the maximum amount authorized by law for a

minor military construction project, the Secretary shall notify in writing the congressional defense committees of the nature of, and justification for, the project and the amount of expenditures for such project. Any such construction project may be carried out without regard to section 2802(a) of title 10, United States Code.

“(c) REPORTS.—(1) No later than 60 days after the end of each fiscal year in which the Secretary carries out activities under this part, the Secretary shall transmit a report to the congressional defense committees of the amount and nature of the deposits into, and the expenditures from, the Account during such fiscal year and of the amount and nature of other expenditures made pursuant to section 2905(a) during such fiscal year.

“(2) Unobligated funds which remain in the Account after the termination of the Commission shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

“(3) No later than 60 days after the termination of the Commission, the Secretary shall transmit to the congressional defense committees a report containing an accounting of—

“(A) all the funds deposited into and expended from the Account or otherwise expended under this part; and

“(B) any amount remaining in the Account.

“(d) DISPOSAL OR TRANSFER OF COMMISSARY STORES AND PROPERTY PURCHASED WITH NONAPPROPRIATED FUNDS.—(1) If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropri-

ated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act [Pub. L. 100-526] (10 U.S.C. 2687 note).

“(2) The amount so deposited shall be equal to the depreciated value of the investment made with such funds in the acquisition, construction, or improvement of that particular real property or facility. The depreciated value of the investment shall be computed in accordance with regulations prescribed by the Secretary of Defense.

“(3) The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance in appropriation Acts) for the purpose of acquiring, constructing, and improving—

“(A) commissary stores; and

“(B) real property and facilities for non-appropriated fund instrumentalities.

“(4) As used in this subsection:

“(A) The term ‘commissary store funds’ means funds received from the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code.

“(B) The term ‘nonappropriated funds’ means funds received from a nonappropriated fund instrumentality.

“(C) The term ‘nonappropriated fund instrumentality’ means an instrumentality of the

United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

“(e) ACCOUNT EXCLUSIVE SOURCE OF FUNDS FOR ENVIRONMENTAL RESTORATION PROJECTS.—Except for funds deposited into the Account under subsection (a), funds appropriated to the Department of Defense may not be used for purposes described in section 2905(a)(1)(C). The prohibition in this subsection shall expire upon the termination of the authority of the Secretary to carry out a closure or realignment under this part.

“SEC. 2907. REPORTS

“As part of the budget request for fiscal year 1993 and for each fiscal year thereafter for the Department of Defense, the Secretary shall transmit to the congressional defense committees of Congress—

“(1) a schedule of the closure and realignment actions to be carried out under this part in the fiscal year for which the request is made and an estimate of the total expenditures required and cost savings to be achieved by each such closure and realignment and of the time period in which these savings are to be achieved in each case, together with the Secretary’s assessment of the environmental effects of such actions; and

“(2) a description of the military installations, including those under construction and

those planned for construction, to which functions are to be transferred as a result of such closures and realignments, together with the Secretary's assessment of the environmental effects of such transfers.

"SEC. 2908. CONGRESSIONAL CONSIDERATION OF COMMISSION REPORT

"(a) TERMS OF THE RESOLUTION.—For purposes of section 2904(b), the term 'joint resolution' means only a joint resolution which is introduced within the 10-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), and—

"(1) which does not have a preamble;

"(2) the matter after the resolving clause of which is as follows: 'That Congress disapproves the recommendations of the Defense Base Closure and Realignment Commission as submitted by the President on ———', the blank space being filled in with the appropriate date; and

"(3) the title of which is as follows: 'Joint resolution disapproving the recommendations of the Defense Base Closure and Realignment Commission.'.

"(b) REFERRAL.—A resolution described in subsection (a) that is introduced in the House of Representatives shall be referred to the Committee on Armed Services of the House of Representatives. A resolution described in subsection (a) introduced in the Senate shall be referred to the Committee on Armed Services of the Senate.

"(c) DISCHARGE.—If the committee to which a resolution described in subsection (a) is referred has

not reported such resolution (or an identical resolution) by the end of the 20-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), such committee shall be, at the end of such period, discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the House involved.

"(d) CONSIDERATION.—(1) On or after the third day after the date on which the committee to which such a resolution is referred has reported, or has been discharged (under subsection (c)) from further consideration of, such a resolution, it is in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. A Member may make the motion only on the day after the calendar day on which the Member announces to the House concerned the Member's intention to make the motion, except that, in the case of the House of Representatives, the motion may be made without such prior announcement if the motion is made by direction of the committee to which the resolution was referred. All points of order against the resolution (and against consideration of the resolution) are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the respective House shall immediately proceed to consideration of the joint reso-

lution without intervening motion, order, or other business, and the resolution shall remain the unfinished business of the respective House until disposed of.

“(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the resolution. An amendment to the resolution is not in order. A motion further to limit debate is in order and not debatable. A motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is agreed to or disagreed to is not in order.

“(3) Immediately following the conclusion of the debate on a resolution described in subsection (a) and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

“(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution described in subsection (a) shall be decided without debate.

“(e) CONSIDERATION BY OTHER HOUSE.—(1) If, before the passage by one House of a resolution of that House described in subsection (a), that House receives from the other House a resolution described in subsection (a), then the following procedures shall apply:

“(A) The resolution of the other House shall not be referred to a committee and may not be

considered in the House receiving it except in the case of final passage as provided in subparagraph (B) (ii).

“(B) With respect to a resolution described in subsection (a) of the House receiving the resolution—

“(i) the procedure in that House shall be the same as if no resolution had been received from the other House; but

“(ii) the vote on final passage shall be on the resolution of the other House.

“(2) Upon disposition of the resolution received from the other House, it shall no longer be in order to consider the resolution that originated in the receiving House.

“(f) RULES OF THE SENATE AND HOUSE.—This section is enacted by Congress—

“(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

“(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

"SEC. 2909. RESTRICTION ON OTHER BASE CLOSURE AUTHORITY

"(a) **IN GENERAL.**—Except as provided in subsection (c), during the period beginning on the date of the enactment of this Act [Nov. 5, 1990] and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

"(b) **RESTRICTION.**—Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified in subsection (a)—

"(1) to identify, through any transmittal to the Congress or through any other public announcement or notification, any military installation inside the United States as an installation to be closed or realigned or as an installation under consideration for closure or realignment; or

"(2) to carry out any closure or realignment of a military installation inside the United States.

"(c) **EXCEPTION.**—Nothing in this part affects the authority of the Secretary to carry out—

"(1) closures and realignments under title II of Public Law 100-526 [set out below]; and

"(2) closures and realignments to which section 2687 of title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

"SEC. 2910. DEFINITIONS

"As used in this part:

"(1) The term 'Account' means the Department of Defense Base Closure Account 1990 established by section 2906(a)(1).

"(2) The term 'congressional defense committees' means the Committees on Armed Services and the Committees on Appropriations of the Senate and of the House of Representatives.

"(3) The term 'Commission' means the Commission established by section 2902.

"(4) The term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. Such term does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

"(5) The term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances.

"(6) The term 'Secretary' means the Secretary of Defense.

"(7) The term 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States.

“SEC. 2911. CLARIFYING AMENDMENT

“[Amended this section.]”

[For effective date of amendments by section 344 (b)(1) of Pub. L. 102-190 to section 2906 of Pub. L. 101-510, set out above, see Effective Date of 1991 Amendments by Section 344 of Pub. L. 102-190 note set out above.]

[Section 2821(h)(2) of Pub. L. 102-190 provided that: “The amendment made by paragraph (1) [amending section 2910 of Pub. L. 101-510 set out above] shall take effect as of November 5, 1990, and shall apply as if it had been included in section 2910 (4) of the Defense Base Closure and Realignment Act of 1990 [section 2910 of Pub. L. 101-510] on that date.”]

[Section 2827(a)(3) of Pub. L. 102-190 provided that: “The amendments made by this subsection [amending sections 2905 and 2906 of Pub. L. 101-510 set out above] shall take effect on the date of the enactment of this Act [Dec. 5, 1991].”]

[References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.]

APPENDIX H

The Administrative Procedure Act,
5 U.S.C. 551-559 & 701-706

Sec. 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2

of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

No. 93-289

Supreme Court, U.S.

FILED

SEP 23 1993

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN H. DALTON, SECRETARY OF
THE NAVY, ET AL.,

Petitioners,

v.

ARLEN SPECTER, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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EDITOR'S NOTE

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Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari.¹

REASONS FOR DENYING THE PETITION

A. Petitioners Would Render The "Fair Process" Purpose Of The Base Closure Act A Complete Nullity.

The issue presented is clear: Will the Base Closure Act ensure a "*fair process*" — as Congress expressly intended — or will its very purpose be rendered a nullity because there is no way to enforce its procedural mandates?² In this case, petitioners have blatantly ignored mandatory

1. Respondents are United States Senators Arlen Specter, Harris Wofford, Bill Bradley and Frank R. Lautenberg; United States Representatives Robert E. Andrews, Curt Weldon, Marjorie Margolies-Mezvinsky, James C. Greenwood and Robert A. Borski; the Commonwealth of Pennsylvania and its Governor Robert P. Casey and Attorney General Ernest D. Preate, Jr.; the State of New Jersey and its Governor James J. Florio and Attorney General Fred DeVesa; the State of Delaware and its Governor Thomas R. Carper; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3; the Metal Trades Council, Local 687 Machinists; Planners Estimators Progressmen & Schedulers Union, Local No. 2; and Union representatives William F. Reil, Howard J. Landry and Ronald Warrington. See Sup. Ct. R. 35.3.

2. Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808. Section 2901(b) of the Act provides:

"Sec. 2901. Short Title and Purpose

* * *

(b) *Purpose.* — The purpose of this part is to provide a *fair process*" (Emphasis added).

procedural requirements of the Act.³ If judicial review were denied, "fair process" could be defeated every time simply by the bureaucracy's refusal, as in this case, to adhere to fundamental statutory safeguards.

Had it so chosen, Congress easily could have vested the President with unrestricted discretion to close bases unilaterally, using any criteria he desired or no criteria at all. However, Congress chose instead to promulgate the Base Closure Act, with the *express purpose* of ensuring a "fair process". §2901(b) (emphasis added).

To achieve a fair process, the Secretary of Defense and the Base Closure Commission are mandated to follow non-discretionary statutory procedures. As petitioners concede:

"[T]he Secretary of Defense *must* submit a six-year 'force-structure plan ... based on an assessment ... of the probable threats to the national security' during that period. §2903(a). The Secretary also *must* establish, *after notice and an opportunity for public comment*, selection criteria to be used in making base closure recommendations. §2903(b). *Based on* the force-structure plan and selection criteria ..., the Secretary must prepare base closure recommendations ... §2903(c).

The Act *requires* the Secretary of Defense ... to forward his recommendations to Congress and to the ... Commission ... §§2902(a), 2903(c)(1). The Secretary *must* make available to the Commission and the Comptroller General ... all the information used in making his recommendations. §2903(c)(4). The Commission *is charged with holding public hearings* and then preparing a report containing both an assessment of the Secretary's recommendations and the

3. Because the District Court dismissed the complaint pursuant to Fed.R.Civ.P. 12(b)(6), respondents' factual allegations of blatant procedural violations by petitioners must be deemed true. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). See note 4 *infra* at p. 3.

Commission's own recommendations for base closures. §2903(d)(1) and (2)". (Pet. at 3-4) (emphasis added).⁴

The proposed list of closures — required to have been formulated in accordance with the fair process mandated by Congress — then goes to the President, who has a mere 15 days to review it and accept or reject it *in its entirety*. (Pet. at 4-5, 23-24).

As the Third Circuit emphasized, the procedures mandated by the Act are not mere window-dressing, but rather are the heart of the legislation. The President *must* rely upon the integrity of the process that resulted in the recommended closure list since he has neither the time nor the resources to verify independently that the process was fair.⁵ Moreover, he has *no authority* to act if the mandated statutory process was violated:

"[W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish *exclusive means* for closure of domestic bases. §2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of*

4. Respondents' allegations, which must here be accepted as true, establish, *inter alia*, that (a) petitioners deliberately disabled the Comptroller General from performing his statutory duties by withholding key information; (b) in the proceedings before the Commission, all information favorable to respondents was suppressed from the public and closed-door meetings with the Navy were held after the completion of public hearings in order to gather information necessary to support the Navy's predetermined decision to close the Philadelphia Naval Shipyard; and (c) the Navy compiled a "stealth list" of base closings from a prior base closure list and manipulated the base closure criteria to close the Shipyard. All of these allegations must be deemed to be true. See note 3 *supra*.

5. Thus, the actions of the Secretary of Defense and the Commission indisputably are "final agency action" for purposes of judicial review. See pp. 11-14 *infra*.

the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.'

* * *

[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process." (App. 7a, 12a) (emphasis added).

It follows inexorably that judicial review must exist to determine whether the procedures mandated by Congress have been followed. Historically, only the federal courts have performed this critical check-and-balance function.⁶

Petitioners argue that there is no judicial review because the Secretary of Defense's and the Commission's reports are not "final agency action" in that they are merely "tentative", "preliminary" and "nonbinding" and have "no direct effect". (Pet. at 12, 18-19). Clearly, however, the agencies' reports are "final" from an administrative perspective, since there is nothing left for the agencies to do, and they *do* have a direct effect because the President must rely upon them and, indeed, has no authority to act

6. Petitioners err in contending that the need for judicial review is supplanted by the provision in the Base Closure Act for congressional disapproval of proposed closures by joint resolution. (Pet. at 4-5). First, Congress has only a mere 45 days in which to act. §2904(b). Second, accepting *arguendo* petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. at 5), the President would have total power to decide base closures. If that is what Congress had intended, the Base Closure Act would have been unnecessary.

unless the integrity of the process which produced them was maintained.⁷

If, as petitioners contend, it makes no difference whether or not the proposed closures have been determined in accordance with the fair process mandated by Congress, then the purpose of the Base Closure Act has effectively been nullified. Such a conclusion would violate the fundamental precept of statutory construction that legislation must be interpreted in a manner which effectuates, not frustrates, its purpose. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy." . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("[w]e must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940) ("[Appellant's] construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question").

The fallacies in petitioners' interpretation that there is no judicial review are illustrated by the following

7. The President must accept or reject the list submitted as a whole. If a military installation does not appear on a list submitted by the Commission to the President, it *cannot be closed* under the Act. §2903(e).

hypothetical.⁸ Assume that: (1) totally ignoring his statutory duty (§2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather on his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) with knowledge of these violations and in violation of its own statutory duties (§2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider and debate a joint resolution of disapproval within 45 days; (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live — all *without* a fair process.

If, as petitioners urge, the federal courts lack jurisdiction even to review the most blatant, unlawful and contemptuous violations of the process expressly mandated by Congress, then not only will public confidence in the integrity of government be shattered,⁹ but the very foundation of the Republic will be shaken.

8. The facts stated are only slightly more extreme than those actually alleged, and must be accepted as true, in this case.

9. The Act mandates a "fair process" to ensure that affected individuals and communities will accept the painful and permanent effects of base closure. To that end, the Act contains a host of non-discretionary procedural safeguards, none of which appear in predecessor base closure statutes. See 10 U.S.C. §2687 (1977) (Secretary of Defense permitted to select bases for closure unilaterally); Pub. L. No. 100-526, §§201-209, 102 Stat. 2623, 2627-34 (1988) (permitting closures on the basis of secret meetings and unverified information). Thus, not only do the structure, purpose and history of the Act *not* demonstrate an

(footnote continued on next page)

B. The Third Circuit's Opinions Are Consistent With *Franklin*.

Although this Court declined in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), to permit review of the President's decision under the Administrative Procedure Act, 5 U.S.C. §§701 *et seq.* ("APA"),¹⁰ it held that "the President's actions may still be reviewed for constitutionality". 112 S. Ct. at 2776 (emphasis added). The Third Circuit, applying *Franklin*, held that judicial review is likewise available here because the President's action in approving the base closure list "failed to comply with the mandatory procedural requirements of the only statute authorizing such action and ... thereby violated the constitutionally-mandated separation of powers". (App. 14a). Accordingly, the Third Circuit found *Franklin* to be "affirmative support" for its holding:

"[T]here is a constitutional aspect to the exercise of judicial review in this case — an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case." (App. 10a).

Judicial review is also available under the APA because the actions of the Secretary of Defense and the Base Closure Commission were "final" within the meaning of *Franklin*. See pp. 11-14 *infra*.

(footnote continued from preceding page)

intent by Congress to preclude judicial review (Pet. at 20-28), but they literally cry out for the judiciary to perform its historic role.

10. The APA subjects the "final" actions of federal agencies to judicial review. *Franklin* held on its unique facts that the final act in question in that case was that of the President, not an administrative agency, and that the President is not an agency subject to the APA. 112 S. Ct. at 2775.

1. The Third Circuit's Opinions Properly Rely Upon and Apply the *Youngstown* Doctrine.

Petitioners argue that their egregious conduct is forever insulated from all judicial review because under the Base Closure Act it is "the President" who acts finally to approve or disapprove bases for closure. Yet even if that were true,¹¹ the President *must* have constitutional or statutory authority for his actions. Indeed, this Court's seminal decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) — which established that "[t]he President's power . . . must stem either from an act of Congress or from the Constitution itself" — was cited with approval in *Franklin*, 112 S. Ct. at 2776. The Third Circuit explained:

"We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. See *id.* at 585; see also *United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990) ('It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any . . . must stem from an act of Congress or from the Constitution itself.' (citing *Youngstown Steel*); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) ('*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.'") (quoting *Nixon v. Sirica*, 487 F.2d 700, 793

11. As discussed *infra* at pp. 11-14, the "final" action for purposes of judicial review under the APA was taken not by the President, but by the Secretary of Defense and the Base Closure Commission.

(Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. See, e.g., *National Treasury Employees Union*, 492 F.2d at 604 ('[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.');

see also U.S. Const. Art. II, §3 ('[T]he President shall take care that the laws be faithfully executed . . .')."¹² (App. 11a).

In the present case, the President's authority to act with respect to the Commission's recommendations is *linked inextricably* to the integrity of the administrative process which preceded his involvement. The failure of the Secretary of Defense and the Commission to comply with non-discretionary procedural mandates of the Act left the President without authority to act on such recommendations. As the Third Circuit emphasized:

12. Courts have long recognized "general principles of judicial review" where (as here) express statutory procedures have been blatantly ignored. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) (recognizing under general principles of judicial review that an agency must articulate a basis for its findings in reports to the President); *Leedom v. Kyne*, 358 U.S. 184, 190-191 (1958) (courts will not lightly infer that Congress does not intend the judiciary to protect rights it confers against agency actions taken in excess of delegated powers); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 551 (1937) ("It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers . . . to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority"); *U.S. ex rel. Kansas City So. R. Co. v. Interstate Commerce Commission*, 252 U.S. 178, 187-188 (1920) (court has power to enforce an agency's refusal to discharge duties which a statute exacts). See also *Maple Leaf Fish Co. v. United States*, 596 F. Supp. 1076, 1081 (C.I.T. 1984), *aff'd*, 762 F.2d 86 (Fed. Cir. 1985) (recognizing under general principles of judicial review that an agency must fairly apprise the President, interested parties and the public of the reasoning underlying its recommendations to the President).

"Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*. 112 S. Ct. at 2776 (citing *Youngstown*) The President . . . must have statutory or constitutional authority for his actions and *where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.*" (App. 12a) (emphasis added).¹³

Petitioners' contention that the Third Circuit misapplied *Youngstown* by "conflating" constitutional, statutory and ultra vires theories (Pet. at 14-19) is sheer sophistry. *Franklin*, citing *Youngstown*, expressly held that "the President's actions may be reviewed for constitutionality". 112 S. Ct. at 2776. If the President has violated the constitutional separation of powers doctrine by exceeding the authority vested in him by Congress, such unconstitutional conduct "may be reviewed". Nothing in *Franklin* even remotely suggests that the only type of constitutional challenge available is the type of challenge involved there.¹⁴

Petitioners' *in terrorem* argument that the Third Circuit's decisions will result in a flood of "broad non-APA

13. It is obvious from the structure of the statute that the President must rely on the procedural integrity of the process, since he is given a scant 15 days to review the Commission's report and has neither the time nor the resources to research independently or to verify the integrity of that process.

14. In *Franklin*, a violation of the apportionment standards set forth in Article I, §2, cl. 3 of the Constitution was alleged.

judicial challenges to Presidential action" (Pet. at 11, 14-15) must also be rejected. The Base Closure Act is unique in that it was enacted specifically to provide a "fair process" for a highly specialized function — the closure and realignment of military bases. Moreover, this case does *not* involve what petitioners call "routine allegations of statutory error", "garden-variety statutory error" or "routine defects". (Pet. at 14-15). Petitioners' brazen disregard for the non-discretionary procedures mandated by Congress was, one would hope, unprecedented, unparalleled and certainly not "business as usual" for the government.

2. Petitioners' Actions Were "Final" Within the Meaning of *Franklin* and the APA.

For purposes of determining finality under the APA, *Franklin* stated that "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties". 112 S. Ct. at 2773. The agency action in *Franklin* was not "final" because the Secretary of Commerce's report to the President carried "no direct consequences" and had "no direct effect". *Id.* at 2774.

Franklin and the present case, however, do not share "similar statutory schemes". (Pet. at 2). Here, the actions of the Secretary of Defense and the Base Closure Commission *did* constitute "final" agency action. Congress did not delegate the decision to close military bases to the President. Rather, it set up mandatory non-discretionary agency procedures to ensure a "fair process". The fact that the President has a limited oversight function does not detract from the "finality" of the agencies' actions.¹⁵ On the

15. In fact, a multitude of agency decisions are subject to confirmation by the President and/or Congress. To conclude that none of these decisions is ever "final" and therefore insulated from judicial review would encourage agency disregard for procedural fairness. See (footnote continued on next page)

contrary, *only* the agencies are subject to the procedural requirements which are the *raison d'être* of the Act, and whether they have complied with those critical requirements directly and materially affects the President's decision. It indisputably is *not* the President's duty to review the procedural integrity of the base closure process or to analyze whether petitioners have complied with the Act's procedural mandates, nor does the Act give him either the time or the resources to do so. See §2903(e) (President has only 15 days to review Commission's report). See also *Colorado Environmental Coalition v. Lujan*, 1992 WL 231020 (D. Colo., Sept. 14, 1992) ("Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that ... the challenged agency action is final").

Moreover, under the Base Closure Act, the President cannot revise or amend the Commission's list of closures. His sole authority is to accept or reject the entire list. As petitioners concede:

"A critical aspect of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard the Commission's role* in the process, the Act provides that its recommendations *must* be considered as an *indivisible package*. H.R. Conf. Rep. No. 923, *supra*, at 704. The President may trigger base closures under the Act only by approving 'all the

(footnote continued from preceding page)

Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984); *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *Colorado Environmental Coalition v. Lujan*, 1992 WL 231020 (D. Colo., Sept. 14, 1992) (all permitting judicial review of an agency's procedural violations of the National Environmental Policy Act where the agency in question only submitted a recommendation to the President for final approval).

recommendations' of the independent Commission. See §2903(e)(2) and (4)." (Pet. at 23) (emphasis added).

Therefore, the President *must* rely on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the non-discretionary mandated procedural safeguards.¹⁶ In *Franklin*, by contrast, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner that the results were specifically changed. *Franklin*, 112 S. Ct. at 2774. The statute in *Franklin* also did "not expressly require the President to use the data in the Secretary's report". *Id.*

To apply *Franklin* with the overly broad brush urged by petitioners would eviscerate 40 years of pre-*Franklin* precedent sustaining judicial review of agency action. This Court has repeatedly and consistently sustained the "strong presumption" of judicial review of final agency action under the APA where — as here — there has been a failure to comply with the procedural mandates of a statute.¹⁷ See, e.g., *Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc.*, 112 S. Ct. 459, 460 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Accord *Franklin*, 112 S. Ct. at

16. See note 7 *supra*.

17. This Court has made it equally clear that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 839 (1985). In words directly applicable here, the concurrence in *Heckler* observed: "It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands" 470 U.S. at 839.

2783-86 (Stevens, J., concurring).¹⁸ As held by the Third Circuit in the present case, the strong presumption favoring judicial review has *not* been rebutted by petitioners. (App. 39a-63a).

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result, which is the antithesis of this nation's tripartite separation-of-powers government, could not have been intended by this Court in *Franklin*.

C. The Third Circuit's Opinion On Remand Does Not Conflict With *Cohen v. Rice*.

In an attempt to create a "direct conflict" between the Third and First Circuits, petitioners mischaracterize *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as precluding judicial review "of *all* claims under the Base Closure Act". (Pet. at 11) (emphasis added). However, *Cohen* addressed *only* the question of the court's jurisdiction to consider a base closure challenge under Section 701 of the APA and (as petitioners concede) did *not* undertake the constitutional review on which the Third Circuit premised its May 18, 1993 opinion. (Pet. at 20). Given this bright line between the two circuit court opinions, petitioners' alleged

18. Guided by this precedent, the federal courts of appeals have consistently held that judicial review is available under the APA for procedural violations by an agency. See, e.g., *First Federal Savings and Loan Association of Lincoln v. Casari*, 667 F.2d 734, 739-740 (8th Cir.), cert. denied, 458 U.S. 1106 (1982); *Hollingsworth v. Harris*, 608 F.2d 1026 (5th Cir. 1979); *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978). See also *Kirby v. United States Department of Housing & Urban Dev.*, 675 F.2d 60, 67 (3d Cir. 1982) (the "APA circumscribes judicial review only to the extent that . . . agency action is committed to agency discretion by law; it does not foreclose judicial review altogether").

"conflict" is artificial and illusory and does not provide a basis for granting certiorari. See *Sanchez v. Borrás*, 283 U.S. 798 (1931).¹⁹

Petitioners' alleged need for "uniformity" between the circuits in order to administer the Base Closure Act is a poorly disguised plea for license to disregard the Act. Whether or not their actions are reviewable by a court, petitioners are bound to abide by the mandatory procedures prescribed by Congress. Even if both the Third Circuit and First Circuit decisions remain intact, petitioners' duty to close bases pursuant to a fair process remains the same.²⁰

19. Because, as shown *supra*, the agencies' actions under the Base Closure Act are "final" within the meaning of the APA, the First Circuit erred in dismissing *Cohen* for lack of jurisdiction under the APA. The *Cohen* court only superficially focused on the critical distinction between procedural and substantive challenges to agency actions under the Base Closure Act and the APA, and completely disregarded this Court's mandate that judicial review *must* be permitted absent clear evidence of congressional intent to preclude such review. *Cohen* encourages agencies to flout congressional mandates and place themselves beyond the reach of law.

20. Petitioners also attempt to resurrect the argument that this case involves national security and the Court should therefore abdicate its responsibility to review agency compliance with the Act. (Pet. at 20). This is an absolute misstatement. As petitioners well know, having raised the point unsuccessfully below, the express language of the statute *excludes* matters of national security. See §2909(c)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 24, 1993

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No. 93-289

Supreme Court, U.S.
FILED

OCT - 8 1993

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.,
PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the questions presented in this case are of substantial legal and practical importance in the implementation of a major initiative by the political Branches to address numerous and competing concerns involved in closing obsolete military bases throughout the Nation. Rather, relying largely upon the specific—and novel—reasoning of the court of appeals, they argue (Br. in Opp. 1-14) that further review is unwarranted because the court below decided the case correctly. Respondents also contend (*id.* at 14-16) that the decision below is not in conflict with *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993).

We have previously shown in the certiorari petition, however, that the court of appeals' decision cannot be reconciled with the principles governing judicial review of presidential action set forth by this Court in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992) (see Pet. 11-19), or with principles governing preclusion of judicial review under the Administrative Procedure Act (APA), 5 U.S.C.

701(a)(2) (see Pet. 20-28). Further, as we have explained (Pet. 19-20), the First Circuit's decision in *Cohen v. Rice*, *supra*, directly conflicts with the decision below by holding that procedural claims identical to those brought by respondents here are not subject to judicial review.

1. Respondents contend (Br. in Opp. 1-4) that because the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 91-510, 104 Stat. 1808,¹ prescribes procedures for the Secretary of Defense and the Defense Base Closure and Realignment Commission to observe in preparing nonbinding base closure recommendations, it "follows inexorably that judicial review must exist." Br. in Opp. 4. That contention, however, disregards both the "tentative" (*Franklin*, 112 S. Ct. at 2774) nature of the recommendations of those subordinate officials in the base closure process and the APA's requirement of "final agency action" before judicial review may be secured. 5 U.S.C. 704.

To be sure, the Base Closure Act requires the Secretary and the Commission to follow certain procedures in preparing their respective base closure recommendations. See Pet. 3-5. As we have explained (Pet. 12-13), however, the Act vests the final closure decision in the President himself, subject only to congressional disapproval. § 2903(e). The recommendations of the Secretary and the Commission have no legal effect in their own right, and there is no final and binding determination at all until after the President certifies to Congress his approval of the Commission's recommendations. Accordingly, the outcome of the processes prescribed by Congress for the Secretary and the Commission is not one "that will directly affect the parties" (*Franklin*, 112 S. Ct. at 2773), and their tentative and nonbinding actions are thus not

¹ The provisions of the Base Closure Act, as amended, are reprinted at Pet. App. 98a-128a. Citations to section numbers refer to the version of the Act appearing in 10 U.S.C. 2687 note (Supp. IV 1992).

"final agency action" reviewable under the APA. *Id.* at 2774.

Respondents argue (Br. in Opp. 4, 7) that the actions of the Secretary and the Commission are "final" within the meaning of the APA because there is "nothing left for the agencies to do" once they have completed their recommendations. The same observation, however, could have been made regarding the census report of the Secretary of Commerce in *Franklin*: once the Secretary forwarded her report to the President, she had no further responsibilities under the relevant statute. Yet the Court held that forwarding the census report to the President was not "final agency action" reviewable under the APA. And in doing so, the Court made clear that the test for finality turns on "[1] whether the agency has completed its decisionmaking process, and [2] whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773 (emphasis added). When both the Secretary and the Commission have completed their decisionmaking processes under the Base Closure Act, the second requirement for finality identified in *Franklin* remains unsatisfied.²

² Respondents argue (Br. in Opp. 11, 13) that although the Secretary's and the Commission's recommendations are technically nonbinding, the President has only "a limited oversight function" and "must rely on the final report of the agencies in making his decision." But that argument ignores the statutory reality that "the President and Congress * * * may reject the Commission's recommendations for any reason at all." Pet. App. 69a. Thus, the President's role in the base closure process can hardly be characterized as the ministerial task of forwarding to Congress legally binding (and therefore final) recommendations of his subordinates. In this case, as in *Franklin*, the agency's recommendations have no effect unless and until the President chooses to approve them and formally to certify that approval to Congress. It is only such action by the President personally that can have any final and binding effect. The inherent "tentative[ness]" (112 S. Ct. at 2774) of the antecedent recommendations renders them nonfinal within the meaning of the APA.

2. *Franklin* also establishes that the action of the President in approving the Commission's report and certifying that approval to Congress does not constitute "final agency action" because the President is not an "agency" within the meaning of the APA. 112 S. Ct. at 2775-2776; see Pet. 13. Echoing the Third Circuit's reasoning, however, respondents argue (Br. in Opp. 7-11) that their claims of procedural noncompliance by the Secretary and the Commission state a constitutional claim of ultra vires presidential action, and that such claims are reviewable outside the confines of the APA.³

It is true that where an appropriate cause of action exists, an executive officer may be subject to specific relief if he acts ultra vires his constitutional or statutory authority. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949). Here, of course, *Franklin* forecloses any action based on allegations that the President has exceeded his statutory authority. *Franklin* leaves room only for constitutional claims.⁴ Respondents raise only statutory claims, and the claims therefore are barred. The Third Circuit improperly permitted respondents to evade that bar by recharacterizing their claims as ones that the President exceeded his constitutional authority. As we have explained (Pet. 14-16), that rationale, if accepted by this Court, would have the effect of constitutionalizing the entire area of judicial review of agency action.

³ In the proceedings below, respondents themselves never advanced the theory adopted by the court of appeals and, in fact, disputed its underlying premises. See Pet. 13 n.9.

⁴ This Court has left open the question whether the President may ever be subject to injunctive relief—even to require his performance of a ministerial duty. See *Franklin*, 112 S. Ct. at 2776. At the very least, however, federal courts in general have "no jurisdiction * * * to enjoin the President in the performance of his official duties." *Id.* at 2776-2777 (quoting *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)).

Furthermore, respondents' claims fall far short of meeting this Court's strict requirements for showing ultra vires conduct. This Court distinguishes sharply between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." *Larson*, 337 U.S. at 691 n.12. Only the latter claims—which typically involve a "depart[ure] from a plain official duty," *Payne v. Central Pac. Ry.*, 255 U.S. 228, 238 (1921)—raise the question of ultra vires executive conduct. See Pet. 16-18.

In respondents' view, the procedural claims pressed in this suit reflect "blatant[]" and "brazen" (Br. in Opp. 1, 11) departures from the President's limited statutory authority to close military bases. The record, however, does not support respondents' contention that the President has departed from any plain official duty by accepting the Commission's recommendations in this case. Respondents claim that the Secretary of Defense and the Commission did not observe certain procedural requirements of the Base Closure Act in the course of preparing their nonbinding base closure recommendations. Specifically, they allege that those officials violated the Act (1) by transmitting an incomplete administrative record to the General Accounting Office (GAO) (Pet. App. 6a n.3); and (2) holding non-public meetings (*id.* at 7a n.3).⁵ Yet nothing in the Base Closure Act or the circumstances surrounding its enactment indicates that the President is disabled from approving base closure recommendations unless he first determines whether there was any form of procedural

⁵ In describing their claims, respondents include (Br. in Opp. 3 n.4) the allegation that the Navy "manipulated the base closure criteria to close the [Philadelphia Naval] Shipyard." In its original decision, however, the court of appeals held that that claim was not subject to judicial review. Pet. App. 56a. Respondents did not seek review of that ruling, and this claim regarding the Philadelphia Naval Shipyard therefore is not properly before this Court.

error in the process.⁶ Rather, as the court of appeals recognized, the President “may reject the Commission’s recommendations for any reason at all,” and “the decision on which bases to close is committed by law to presidential discretion.” Pet. App. 46a, 69a. Thus, whatever the merits of respondents’ procedural allegations, the President was under no plain official duty to reject recommendations alleged to be infected with procedural error, and he was not without authority to adopt the Commission’s recommendations and submit a certificate to that effect to Congress.⁷

⁶ Respondents in fact concede (Br. in Opp. 12) that the Act—which effectively requires the President to act on the Commission’s report within two weeks of receiving it (§ 2903(e))—does not require the President to ensure that his subordinates have complied with the procedural requirements of the Act. It therefore would be bizarre for a court to do so, and to set aside (or enjoin implementation of) the President’s decision if it finds that there were procedural errors in that process.

At the same time, respondents err in claiming (Br. in Opp. 5) that the absence of judicial review renders the Act’s procedural requirements a nullity. First, executive officers who implement the Base Closure Act are bound to follow the law, regardless whether the courts may enforce that obligation. Second, because the President is directly accountable for the base closure decision, he has a strong incentive to see that the integrity of the process is maintained on an ongoing basis; otherwise, he may be unable to defend his approval of painful base closures as being the result of an independent, bipartisan process. Third, the Act requires the Secretary and the Commission to keep Congress apprised of developments at many steps in the formulation of base closure recommendations. See, e.g., § 2903(a)(1), (b)(2), (c)(1) and (d)(3). Congress therefore also has the opportunity to monitor compliance with the process, and it may consider alleged procedural defects in deciding whether to reject the President’s recommendations under the streamlined legislative process prescribed by the Act. See Pet. 5-6. In this case, Congress was fully apprised of respondents’ procedural objections to the selection of the Philadelphia Naval Shipyard for closure (see Pet. 6), but it nonetheless chose not to disapprove the President’s decision.

⁷ Respondents suggest (Br. in Opp. 9 n.12) that this Court has recognized “general” judicial authority to review claims of serious

3. Respondents argue (Br. in Opp. 14-15) that the decision below does not conflict with the First Circuit’s decision in *Cohen v. Rice*, *supra*. As we have previously shown (Pet. 19-20), however, the plaintiffs in *Cohen*, like respondents here, alleged that the responsible service Secretary failed to supply required information to the GAO and that the Commission held nonpublic meetings in violation of the Act. 992 F.2d at 380. In the face of those virtually identical procedural claims, the First Circuit held that *Franklin* precludes all judicial review. *Id.* at 381-382. That ruling squarely conflicts with the Third Circuit’s decision here.

Respondents contend that the conflict between this case and *Cohen* is “artificial and illusory” (Br. in Opp. 14-15) because the First Circuit was not asked to decide the reviewability of constitutional claims against the Presi-

procedural error. That suggestion is unsupported by the cases they cite. In *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Natural Gas Act, 15 U.S.C. 717r(b), explicitly authorized judicial review of the order in question. In *Leedom v. Kyne*, 358 U.S. 184, 190-191 (1958), the Court found an implied right of judicial review of agency action in excess of delegated power. But in contrast with this case, the agency action in *Leedom* was facially ultra vires; the statute under which the agency had acted conferred specific rights on the plaintiffs; and the statutory scheme did not vest decisionmaking authority directly in the President. *United States ex rel. Kansas City So. Ry. v. ICC*, 252 U.S. 178, 187 (1920), a pre-APA decision, stands for the unremarkable proposition that mandamus was available to rectify an agency’s “unequivocal refusal to obey” the “direct and express command” of a statute. Here, the Base Closure Act does not direct the President to reject the Commission’s recommendations if there is an allegation of procedural error in the process leading up to the Commission’s recommendations. Finally, respondents err in citing *Virginian Ry. v. Railway Employees*, 300 U.S. 515, 551 (1937), for its dictum that a court may issue a writ of mandamus to require officers to act in a matter over which they have authority; what is more significant, for present purposes, is the Court’s further statement that “the court will not assume to control or guide the exercise of the[] [officers’] authority.” *Ibid.* In this case, respondents would have the district court control the President’s broad discretion to accept or reject the Commission’s recommendations.

dent. But respondents likewise failed to challenge the President's actions on constitutional (or nonconstitutional) grounds. See Pet. 13 n.9. Yet in contrast with the Third Circuit in this case, the First Circuit in *Cohen* treated the plaintiffs' procedural claims as unreviewable claims of statutory error; it did not circumvent this Court's decision in *Franklin* by sua sponte recasting those allegations as a constitutional claim of ultra vires presidential conduct.⁸ Because of the contradictory manner in which the two decisions treat identical claims, further review is warranted to resolve the conflict in authority on this important issue.

4. In addition to the *Franklin* issue, we have also sought review on the question whether the Base Closure Act precludes judicial review within the meaning of the APA, 5 U.S.C. 701(a)(2). As we have explained (Pet. 20-28),

⁸ In addition, in *Public Citizen v. United States Trade Representative*, No. 93-5212 (D.C. Cir. Sept. 24, 1993), the court of appeals relied on *Franklin* in holding that preparation of the North American Free Trade Agreement (NAFTA) is not subject to judicial review concerning compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331 *et seq.* Under governing statutes, the Office of the United States Trade Representative (OTR) was responsible for negotiating NAFTA, but the decision whether to submit it to Congress rests with the President. As the D.C. Circuit explained (slip op. 6 (citation omitted)):

Even though the OTR has completed negotiations on NAFTA, the agreement will have no effect on Public Citizen's members unless and until the President submits it to Congress. Like the reapportionment statute in *Franklin*, the Trade Acts involve the President at the final stage of the process by providing for him to submit to Congress the final legal text of the agreement, a draft of the implementing legislation, and supporting information. The President is not obligated to submit any agreement to Congress, and until he does there is no final action. If and when the agreement is submitted to Congress, it will be the result of action by the President, action clearly not reviewable under the APA.

Unlike in this case, even the President's action in *Public Citizen* is not legally binding, because it merely involves the submission of proposed legislation to Congress.

the structure of the Act, its purposes, and its legislative history all strongly support the conclusion that Congress did not intend to subject the final base closure decisions of the President to judicial review.

Aside from respondents' conclusory assertion that the presumption in favor of judicial review has not been rebutted (Br. in Opp. 14), they do not directly controvert the preclusion analysis set forth in the petition. They emphasize (*id.* at 2-4) that the Base Closure Act's procedural requirements are vital to the statutory objective of adopting fair procedures for closing military bases. But that observation is only half the picture. The Act is also designed to vindicate other substantial interests that are incompatible with judicial enforcement of its procedural particulars.⁹ Specifically, the Act is designed to expedite the base closure process; to avoid the dangers of political stalemate by establishing an indivisible package of closures that stand or fall together; to leave the final decision concerning base closures in the hands of the President and Congress; and to avoid the protracted procedural litigation over base closures that had doomed prior efforts to close obsolete domestic bases. See Pet. 22-27. Judicial intervention—even if limited to claims of procedural irregularity—would be squarely at odds with those crucial statutory objectives.

For that reason, the fact that Congress imposed procedural requirements on the Secretary and the Commission says nothing about whether Congress intended those requirements to be judicially enforceable. By vesting the base closure decision in a uniquely accountable official, the President, and providing a streamlined legislative process for Congress to consider the President's action, Congress

⁹ The Act states that "[t]he purposes of this [statute] is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." § 2901(b) (emphasis added). Respondents selectively quote the passage referring to "fair process" (Br. in Opp. 1 n.2 (emphasis omitted)), but stop short of quoting the underscored language.

assigned the political Branches direct responsibility for ensuring the integrity of the base closure decision. Claims of procedural irregularity may be fully aired in the political process. See note 6, *supra*. Because the availability of a judicial remedy will jeopardize the Act's policies and timetables and undermine (rather than promote) its procedures—and because the Third Circuit's decision squarely conflicts with that of the First Circuit on an issue on which nationwide uniformity regarding a given base closure package is essential—review by this Court is warranted.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1993

(5)
No. 93-289

Supreme Court, U.S.
FILED

DEC 2 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

**JOHN H. DALTON, SECRETARY OF
THE NAVY, ET AL., PETITIONERS**

v.

ARLEN SPECTER, ET AL.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JOINT APPENDIX

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**PETITION FOR A WRIT OF CERTIORARI
FILED AUGUST 23, 1993
CERTIORARI GRANTED OCTOBER 18, 1993**

BEST AVAILABLE COPY

79 PP

In the Supreme Court of the United States

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JOINT APPENDIX

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¹ The following items were printed in the petition appendix and are not reprinted herein: (1) the May 18, 1993, opinion of the court of appeals; (2) the April 17, 1992, opinion of the court of appeals; (3) the November 9, 1992, order of this Court granting certiorari, vacating the April 17, 1992, judgment of the court of appeals, and remanding the case to the court of appeals for further consideration in light of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992); (4) the November 1, 1991, memorandum and order of the district court dismissing the complaint; (5) the June 14, 1993, order of the court of appeals denying rehearing; and (6) the May 20, 1992, order of the court of appeals denying rehearing.

U.S. DISTRICT COURT
OF EASTERN PENNSYLVANIA (Philadelphia)

CIVIL DOCKET FOR CASE #: 91-CV-4322

SPECTER, ET AL.

v.

GARRETT, ET AL.

[Filed: 7/8/91]

* * * * *

7/19/91	4	MOTION BY PLAINTIFFS FOR PRELIMINARY INJUNCTION, MEMORANDUM, CERTIFICATE OF SERVICE. (ag)
7/19/91	6	Amended complaint by PLAINTIFF ARLEN SPECTER, PLAINTIFF HARRIS WOFFORD, PLAINTIFF BILL BRADLEY, PLAINTIFF FRANK R. LAUTENBERG, PLAINTIFF ROBERT P. CASEY, PLAINTIFF COMMONWEALTH OF PA., PLAINTIFF ERNEST D. PREATE JR., PLAINTIFF CURT WELDON, PLAINTIFF THOMAS FOGLIETTA, PLAINTIFF ROBERT ANDREWS, PLAINTIFF R. LAWRENCE COUGHLIN, PLAINTIFF CITY OF PHILA, PLAINTIFF HOWARD J. LANDRY, PLAINTIFF

INTERNATIONAL FED, PLAINTIFF
WILLIAM F. REIL, PLAINTIFF
METAL TRADES COUNCIL, amending
[1-1] complaint (ag)

* * * * *

8/19/91 15 MOTION BY DEFENDANTS TO DIS-
MISS, MEMORANDUM, CERTIFI-
CATE OF SERVICE. (ag) [Entry date
08/20/91]

* * * * *

11/1/91 39 MEMORANDUM AND ORDER THAT
DEFENDANTS' [15-1] MOTION TO
DISMISS IS GRANTED; THE COURT
ENTERS JUDGMENT FOR DEFEND-
ANTS AND THE PLAINTIFFS'
CLAIMS ARE DISMISSED WITH
PREJUDICE. (SIGNED BY JUDGE
RONALD L. BUCKWALTER) 11/4/91
ENTERED AND COPIES MAILED.
(ag) [Entry date 11/04/91]

11/1/91 — Case closed (kv) [Entry date 11/07/91]

* * * * *

11/4/91 42 Notice of appeal by ALL PLAINTIFFS
Copies to: to JUDGE RONALD L.
BUCKWALTER, Clerk USCA, Appeals
Clerk, and DAVID J. ANDERSON,
VINCENT M. GARVEY, MARK W.
BATTEN, DAVID H. PITTINSKY. (ag)
[Entry date 11/05/91]

* * * * *

GENERAL DOCKET FOR
THIRD CIRCUIT COURT OF APPEALS

Court of Appeals Docket #: 91-1932

SPECTER, ET AL.

v.

GARRETT, ET AL.

[Filed: 11/6/91]

Appeal from Eastern District of Pennsylvania

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL
BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR
ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA;
ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY
GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA;
REP. ROBERT ANDREWS; REP. R. LAWRENCE
COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY;
INTERNATIONAL FEDERATION OF PROFESSIONAL AND
TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL;
METAL TRADES COUNCIL, LOCAL 687 MACHINISTS;
GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY;
ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL,
GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE,
REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI,
RONALD WARRINGTON; PLANNERS ESTIMATORS
PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

SEAN O'KEEFE*, ACTING SECRETARY OF THE NAVY; LES ASPEN*, SECRETARY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METAL TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

* [pursuant to Rule 43(c) F.R.A.P.]

11/6/91 CIVIL CASE DOCKETED. Notice filed by Arlen Specter, Harris Wofford, Bill Bradley, Frank R. Lautenberg, Robert P. Comm of PA, Ernest D. Preate, James J. Florio, State of NJ, Robert J. Del Tufo, Michael N. Castle, State of DE, Curt Weldon, Thomas Foglietta, Robert E. Andrews, R. Lawrence Coughlin,

Peter H. Kostmayer, Robert A. Borski, City of Philadelphia, Howard J. Landry, Local 3, William F. Reil, Local 687, Ronald Warrington, Local No 2. (sma)

* * * * *

11/14/91 BRIEF on behalf of APPELLANTS, Pages: 42, Copies: 10, Delivered by mail, filed. Certificate of service date 11/14/91. (rfl)

* * * * *

11/27/91 BRIEF on behalf of Appellee H. Lawrence Garrett, Appellee Richard Cheney, Appellee Def Base Closure, Appellee James A. Courter, Appellee William Ball, Appellee Howard H. Callaway, Appellee Duane H. Cassidy, Appellee Arthur Levitt, Appellee James C. Smith, Appellee Robert D. Stuart, Pages: 50, Copies: 10, Delivered by mail, filed. Certificate of Service date 11/27/91. (rfl)

* * * * *

12/6/91 REPLY BRIEF on behalf of APPELLANTS, Copies: 10, Delivered by mail, filed. Certificate of service date 12/6/91. (wab)

* * * * *

1/28/92 ARGUED 1/25/92 Panel: Stapleton, Scirica and Alito, Circuit Judges. At oral argument Court directed counsel to have transcript prepared of oral argument. (agb)

* * * * *

4/17/92 OPINION (Stapleton, Authoring Judge, Scirica and Alito, Circuit Judges), with separate concurring in part and dissenting in

part opinion by Judge Alito, filed. VACATED—SEE SUPREME COURT JUDGMENT ENTERED 12/14/92. (ch)

4/17/92 JUDGMENT, Reversing and Remanding to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees, filed. VACATED—SEE SUPREME COURT JUDGMENT ENTERED 12/14/92. (ch)

* * * * *

5/1/92 PETITION by Appellees for rehearing in banc. Certificate of service dated 4/30/92, filed. (bj)

5/20/92 ORDER filed, (Sloviter, Chief Judge, Stapleton, Authoring Judge, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard and Alito, Circuit Judges) denying petition for in banc rehearing by Appellee H. Lawrence Garrett, Richard Cheney. Judge Alito would have granted rehearing. (bj)

5/28/92 MANDATE ISSUED, filed. (bj)

* * * * *

11/12/92 Letter dated November 9, 1992 from Clerk of Supreme Court advising that an order was entered 11/9/92 granting the petition for certiorari; the jmt is vacated & case remanded to U.S.C.A. for further consideration in light of Franklin v Mass 505 U.S. — 1992, received for the information of the court. (bj)

11/12/92 SUPREME COURT ORDER filed 11/9/92 granting petition for writ of certiorari and remanding the cause to this Court for further consideration in light of Franklin v. Massachusetts, 505 U.S. — (1992). (anh)

* * * * *

11/24/92 ORDER (Stapleton, Authoring Judge, Scirica and Alito, Circuit Judges) In view of the Supreme Court's remand of this case for reconsideration in light of Frnklin [sic] v Mass, 505 U.S. — (1992)., the court would like supp briefing on (a) the significance of Franklin in the context of this case, and (b) whether any issues in this case as to which Franklin is relevant were preserved in the D.C. and not waived in this court. The parties will exchange main briefs on December 11, 1992 and may file reply briefs on or before December 18, 1992, filed. (bj)

12/11/92 BRIEF FOR APPELLANTS ON REMAND Pages: 15, Copies: orig & 10, Delivered by mail, filed. Certificate of service date 12/10/92. (bj)

12/11/92 ON REMAND FROM THE SUPREME COURT, Supplemental BRIEF for the Appellees, Pages: 15, Copies: orig & 9cc, Delivered by mail, filed. Certificate of Service date 12/11/92. (bj)

12/14/92 U.S. Supreme Court judgment as Filed in the Supreme Court on November 9, 1992: On consideration whereof it is ordered and adjudged by this Court that the judgment of USCA is VACATED and the case is remanded to USCA FOR THIRD CIRCUIT, in light of Frnklin [sic] v Mass 505 U.S. — (1992, filed. (bj)

12/14/92 Copy of Order received from the Supreme Court of the United States allowing certiorari. The petition for writ of certiorari to this Court is granted. (S.C. No. 92-485) (anh)

- 12/18/92 REPLY BRIEF on behalf of Appellants Arlen Specter, et al. Copies: Orig & 9 copies, Delivered by mail, filed. Certificate of service date 12/18/92. (bj)
- 12/18/92 SUPPLEMENTAL REPLY BRIEF (on REMAND from the U.S. Supreme Court), on behalf of the appellees Pages: 10 Copies: orig & 9cc, Delivered by mail, filed. Certificate of service date 12/18/92. (bj)
- 2/24/93 ARGUED 2/24/93 Panel: Stapleton, Scirica, Alito, Circuit Judges. (agb)
- * * * * *
- 5/18/93 OPINION ON REMAND FROM THE SUPREME COURT (Stapleton, Authoring Judge, Scirica and Alito, Circuit Judges), with a dissenting opinion by Judge Alito, filed. (bj)
- 5/18/93 JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES: REVERSED and remanded to D.C. Costs taxed against the appellees, filed. (bj)
- 6/1/93 PETITION by Appellees for rehearing in banc, filed. Certificate of service dated 5/28/93. (ch)
- 6/14/93 ORDER filed (Sloviter, Chief Judge, Stapleton, Authoring Judge, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Lewis, Circuit Judges) denying petition for in banc rehearing by Appellees. Judges Hutchinson, Nygaard and Alito would have granted in banc. (bj)
- 6/21/92 MOTION filed by Appellees to stay mandate. Certificate of Service dated 6/21/93. (bj)
- * * * * *

- 7/2/93 ORDER filed (Stapleton, Circuit Judge) granting motion to stay mandate by Appellee Def Base Closure. Mandate Stayed to 7/21/93 (ch)
- 7/21/93 MOTION filed by Appellee to FURTHER stay mandate to and including August 20, 1993. Certificate of Service dated 7/20/93. (bj)
- 7/21/93 RESPONSE filed by Appellants to motion by Appellees to further stay mandate. Certificate of service dated 7/21/93 (bj)
- 7/26/93 ORDER filed (Stapleton, Authoring Judge) granting motion to further stay mandate by Appellee Sec of the Navy. Mandate Stayed to 8/20/93 (bj)
- 8/18/93 MOTION filed by Secretary Defense to further stay mandate until 8/27/93. Certificate of Service dated 8/17/93. (bj)
- 8/18/93 ORDER filed (Alito, Circuit Judge) granting motion to further stay mandate by Appellee Secretary Defense. Mandate Further Stayed to 8/27/93 (bj)
- * * * * *
- 10/27/93 U.S. Supreme Court order dated 10/18/93 at S.C. number: 93-289, granting petition for writ of certiorari by Appellee Secretary Navy. filed. (bj)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 91-CV-4322

SEN. ARLEN SPECTER, SEN. HARRIS WOFFORD, SEN. BILL
BRADLEY, SEN. FRANK R. LAUTENBERG, GOVERNOR
ROBERT P. CASEY, COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE,
JR., GOVERNOR JAMES J. FLORIO, STATE OF NEW JERSEY,
NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO,
GOVERNOR MICHAEL N. CASTLE, STATE OF DELAWARE,
REP. CURT WELDON, REP. THOMAS FOGLIETTA, REP.
ROBERT ANDREWS, REP. R. LAWRENCE COUGHLIN,
REP. PETER H. KOSTMEYER, REP. ROBERT A. BORSKI,
CITY OF PHILADELPHIA, HOWARD J. LANDRY AND
INTERNATIONAL FEDERATION OF PROFESSIONAL AND
TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL AND
METAL TRADES COUNCIL, LOCAL 687 MACHINISTS AND
RONALD WARRINGTON AND PLANNERS ESTIMATORS
PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2,
PLAINTIFFS

v.

H. LAWRENCE GARRETT, III, THE SECRETARY OF THE
NAVY, RICHARD CHENEY, THE SECRETARY OF DEFENSE,
THE DEFENSE BASE CLOSURE AND REALIGNMENT
COMMISSION AND ITS MEMBERS JAMES A. COURTER,
WILLIAM L. BALL, III, HOWARD H. CALLAWAY, DUANE
H. CASSIDY, ARTHUR LEVITT, JR., JAMES C. SMITH, II,
AND ROBERT D. STUART, JR., DEFENDANTS

VERIFIED AMENDED COMPLAINT FOR DECLARATORY
JUDGMENT AND PRELIMINARY INJUNCTIVE RELIEF

Plaintiffs U.S. Sen. Arlen Specter, U.S. Sen. Harris Wofford, U.S. Sen. Bill Bradley, U.S. Sen. Frank R. Lautenberg, Governor Robert P. Casey, the Commonwealth of Pennsylvania, Pennsylvania Attorney General Ernest D. Preate, Jr., Governor James J. Florio, the State of New Jersey, New Jersey Attorney General Robert J. Del Tufo, Governor Michael N. Castle, the State of Delaware, U.S. Rep. Curt Weldon, U.S. Rep. Thomas Foglietta, U.S. Rep. Robert E. Andrews, U.S. Rep. R. Lawrence Coughlin, U.S. Rep. Peter H. Kostmayer, U.S. Rep. Robert A. Borski, the City of Philadelphia, Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Reil, Metal Trades Council, Local 687 Machinists, Ronald Warrington and the Planners Estimators Progressman & Schedulers Union, Local No. 2 allege as follows:

INTRODUCTION

1. A declaratory judgment and preliminary injunction are necessary to prevent the imminent and unlawful closing of the Philadelphia Naval Shipyard (also referred to as the "Shipyard"), the largest employer in the Philadelphia area. The actions taken by the government officials responsible for ensuring an independent, equal, lawful and fair process for closing and realigning military installations under the Defense Base Closure and Realignment Act of 1990 (the "Base Closure Act"), Public Law 101-510, Title XXIX, §§ 2901-2910 (November 5, 1990), have violated the Base Closure Act and the procedures and regulations promulgated thereunder in *at least 19 separate and material respects*.

2. The plaintiffs respectfully request a declaratory judgment that the Secretary of Defense, the Secretary of the Navy and the Base Closure and Realignment Commission's actions are fundamentally inconsistent with the Base Closure Act and other applicable law and are therefore void.

3. Immediate injunctive relief is necessary because the defendants' unlawful conduct has not only resulted in the Shipyard being placed on a list of military installations slated for closure but the Navy has already taken actions to close the Shipyard which will be irreversible if not addressed immediately.

4. If the requested relief is not granted, the plaintiffs will be immediately and irreparably injured.

PLAINTIFFS

5. Plaintiff United States Senator Arlen Specter is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia County, Pennsylvania, and an office at Room 9400, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

6. Plaintiff United States Senator Harris Wofford is a citizen of the Commonwealth of Pennsylvania with his residence in Montgomery County, Pennsylvania, and an office at Room 9456, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

7. Plaintiff United States Senator Bill Bradley is a citizen of the State of New Jersey with his residence in Morris County, New Jersey, and an office at Union-1605, Vauxhall Road, Union, New Jersey.

8. Plaintiff United States Senator Frank R. Lautenberg is a citizen of the State of New Jersey with his residence in Secaucus, New Jersey, and an office at Gateway I, Newark, New Jersey.

9. Plaintiff Robert P. Casey, Governor of the Commonwealth of Pennsylvania, is a citizen of the Commonwealth of Pennsylvania with his residence in Lackawanna County, Pennsylvania, and an office at Room 229, Main Capitol, Harrisburg, Pennsylvania.

10. Plaintiff the Commonwealth of Pennsylvania is a Sovereign State of the United States.

11. Plaintiff Pennsylvania Attorney General Ernest D. Preate, Jr. is a citizen of the Commonwealth of Pennsylvania with his residence in Lackawanna County, Pennsylvania, and an office at 16th Floor, Strawberry Square, Harrisburg, Pennsylvania. Plaintiff Preate sues individually and as Attorney General of the Commonwealth of Pennsylvania.

12. Plaintiff James J. Florio, Governor of the State of New Jersey, is a citizen of the State of New Jersey with his office at the State House, in the City of Trenton, County of Mercer, State of New Jersey.

13. Plaintiff, the State of New Jersey, is a Sovereign State of the United States.

14. Plaintiff Robert J. Del Tufo, Attorney General of the State of New Jersey, is a citizen of the State of New Jersey with his office at the Richard J. Hughes Justice Complex, in the City of Trenton, County of Mercer, State of New Jersey. As the chief law enforcement officer of the State of New Jersey, Attorney General Del Tufo's authority extends to legal matters of public importance and in the public interest and taking such action as he deems necessary to represent the interests of the State and its citizens, authority that is generally established by Art. V, § IV, ¶ 3 of the 1947 New Jersey Constitution, and is further enhanced by legislative enactment pursuant to *N.J.S.A. 52:17A-1 et seq.* and *N.J.S.A. 52:17B-1 et seq.* In addition, Attorney General Del Tufo has the authority to sue as *parens patriae* on behalf of the citizens of the

State of New Jersey to prevent or redress the direct and vital adverse economic impact that would be experienced by the State of New Jersey and its citizens by a closing of the Philadelphia Naval Shipyard.

15. Plaintiff Michael N. Castle, Governor of the State of Delaware, is a citizen of the State of Delaware with his office at Legislative Hall, Dover, Delaware.

16. Plaintiff, the State of Delaware, is a Sovereign State of the United States.

17. Plaintiff United States Representative Curt Weldon is a citizen of the Commonwealth of Pennsylvania with his residence in Delaware County, Pennsylvania, and an office at 1554 Garrett Road, Upper Darby, Pennsylvania.

18. Plaintiff United States Representative Thomas Foglietta is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia County, Pennsylvania, and an office at Room 10402, Green Federal Building, 6th and Arch Streets, Philadelphia, Pennsylvania.

19. Plaintiff United States Representative Robert E. Andrews is a citizen of the State of New Jersey with his residence in Camden County, New Jersey, and an office at 16 Somerdale Square, Somerdale, New Jersey 08083.

20. Plaintiff United States Representative R. Lawrence Coughlin is a citizen of the Commonwealth of Pennsylvania with his residence in Montgomery County, Pennsylvania, and an office in Norristown, Pennsylvania.

21. Plaintiff United States Representative Peter H. Kostmayer is a citizen of the Commonwealth of Pennsylvania with his residence in Bucks County, Pennsylvania, and an office at 150 South Main Street, Doylestown, Pennsylvania.

22. Plaintiff United States Representative Robert A. Borski is a citizen of the Commonwealth of Pennsylvania

with his residence in Philadelphia County, Pennsylvania, and an office at 7141 Frankford Avenue, Philadelphia, Pennsylvania.

23. Plaintiff the City of Philadelphia is a municipality of the Commonwealth of Pennsylvania.

24. Plaintiff Howard J. Landry is the President of the International Federation of Professional and Technical Engineers, Local 3, and is a citizen of the State of New Jersey with his residence in Cherry Hill, New Jersey. Landry has been employed since 1972 by the Shipyard and has over twenty-seven years of federal service employment. Landry is a member of the class of employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

25. Plaintiff International Federation of Professional and Technical Engineers ("IFPTE"), Local 3, is the exclusive bargaining representative for virtually all General Schedule ("GS") employees of the Shipyard. IFPTE Local 3 has its principal place of business at the Shipyard, Philadelphia, Pennsylvania. IFPTE represents over 1,300 employees of the Shipyard. These employees are employed in GS grades 3 through 12 and work as engineers, technicians and clerical staff, predominantly holding positions in all phases of the repair, overhaul and maintenance of Navy vessels. All of these employees are being affected by the Navy's current conduct and virtually all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

26. Plaintiff William F. Reil, the President of the Metal Trades Council, Local 687 Machinists, is a citizen of the Commonwealth of Pennsylvania with his residence in Philadelphia, Pennsylvania. Reil has been employed since 1953 by the Shipyard. Reil is a member of the class of

employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

27. Plaintiff Metal Trades Council, Local 687 Machinists ("MTC"), is the exclusive bargaining representative for all blue collar workers at the Shipyard. MTC represents over 8,000 employees of the Shipyard and Naval Station. All of these employees are being affected by the Navy's current conduct and virtually all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

28. Plaintiff Ronald Warrington is the President of the Planners Estimators Progressman & Schedulers Union, Local No. 2, and is a citizen of the State of New Jersey with his residence in Cherry Hill, New Jersey. Ronald Warrington is a member of a class of employees whose jobs will be eliminated if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

29. Plaintiff Planners Estimators Progressman & Schedulers Union, Local No. 2 ("PEP&S"), is the exclusive bargaining representative for approximately 350 employees of the Shipyard. PEP&S has its principal place of business at the Shipyard, Philadelphia, Pennsylvania. All of these employees are being affected by the Navy's current conduct and virtually all of these employees will lose their jobs if the Shipyard is closed in accordance with the July 1, 1991 recommendation of the Defense Base Closure and Realignment Commission.

DEFENDANTS

30. Defendant H. Lawrence Garrett, III is the Secretary of the Navy and maintains his principal office at the Department of the Navy, The Pentagon, Washington,

D.C. Defendant Garrett is sued in his official capacity as Secretary of Navy.

31. Defendant Richard Cheney is the Secretary of Defense and maintains his principal office at the Department of Defense, The Pentagon, Washington, D.C. Defendant Cheney is sued in his official capacity as Secretary of Defense.

32. Defendant The Defense Base Closure and Realignment Commission (the "Commission") is the agency of the United States charged with ensuring an independent, equal, lawful and fair process for closing and realigning military installations.

33. Defendant James A. Courter is Chairman of the Commission and is sued in his official capacity.

34. Defendant William L. Ball, III is a member of the Commission and is sued in his official capacity.

35. Defendant Howard H. Callaway is a member of the Commission and is sued in his official capacity.

36. Defendant Gen. Duane H. Cassidy, USAF (Ret.) is a member of the Commission and is sued in his official capacity.

37. Defendant Arthur Levitt Jr. is a member of the Commission and is sued in his official capacity.

38. Defendant James C. Smith, II, P.E. is a member of the Commission and is sued in his official capacity.

39. Defendant Robert D. Stuart, Jr. is a member of the Commission and is sued in his official capacity.

JURISDICTION AND VENUE

40. This Court has jurisdiction over the subject matter of this lawsuit pursuant to: (a) the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; (b) 28 U.S.C. §§ 1331, 1337, 1346 and 1361; (c) the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, Title

XXIX, §§ 2901-2910 (November 5, 1990); and (d) the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

41. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

STATEMENT OF FACTS

A. *The Philadelphia Naval Shipyard*

42. Founded in 1801, the Philadelphia Naval Shipyard is a major industrial complex consisting of extensive and large drydocks, piers, production shops, equipment and other assets valued at almost 3 billion dollars. The Philadelphia Naval Station services the Shipyard.

43. Operations at the Shipyard involve at least 47,000 jobs in the Philadelphia metropolitan area (31,000 direct and indirect positions, 7,000 additional ship-associated personnel and 9,100 direct and indirect positions associated with the Philadelphia Naval Station).

44. There are eight Naval Shipyard in the United States: Puget Sound, Norfolk, Philadelphia, Mare Island, Charleston, Pearl Harbor, Portsmouth and Long Beach.

45. Almost 15% of the total repair and modernization work performed by all eight Naval Shipyards is accomplished at the Philadelphia Shipyard.

46. In addition to performing work on large amphibious ships and other large vessels, the Philadelphia Shipyard's physical assets and experienced work force make it the premier facility for work on the Navy's non-nuclear aircraft carriers and highly sophisticated and complex cruisers and destroyers.

47. The Shipyard excels in the Service Life Extension Program ("SLEP"), which extends the life of non-nuclear carriers in the Naval fleet by 15-30 years at a cost of about \$1 billion or less per carrier.

48. Philadelphia is the only Naval Shipyard performing SLEP work.

49. In the 1991 Defense Appropriation Act, the Congress has required a \$405 million CV-SLEP on the aircraft carrier U.S.S. Kennedy to be performed at the Shipyard. The CV-SLEP is not scheduled to be completed until mid-1996.

50. From 1980 through the present, Philadelphia has led all eight Naval Shipyards in efficiency and cost-effectiveness, due largely to the excellence of its highly skilled work force.

51. Contrary to the statements of the Navy, not a penny will be saved by the closure of the Shipyard.

52. Philadelphia is one of only two Naval Shipyards operating in the black with positive net operating results in the last two years.

53. The Shipyard differs from most other governmental agencies because it operates as a private business and is not funded directly from the defense budget. Personnel payrolls, building maintenance and nearly all other overhead and operating expenses are paid for by selling Shipyard services to customers in a highly competitive environment.

54. Unlike most other governmental agencies, the Shipyard does not receive annual appropriations in support of operations. Rather, it generates its revenues by charging customers for work performed.

55. If the Shipyard is closed, the work performed there will ultimately be performed at greater cost to the Navy.

B. *Enactment of the 1990 Defense Base Closure and Realignment Act*

56. On May 3, 1988, then Secretary of Defense, Frank Carlucci, chartered the Defense Secretary's Commission

on Base Realignment and Closure to evaluate and recommend a reduction in the military installations located in the United States.

57. In October 1988, Congress passed and the President signed Public Law 100-526, the Defense Authorization Amendment and Base Closure and Realignment Act.

58. The 1988 Commission on Base Realignment and Closure recommended that 86 bases be closed and 59 bases be realigned or partially closed. These recommendations were strongly criticized by members of Congress and the public.

59. Congressional critics contended that the 1988 base closure and realignment recommendation process had not been sufficiently open to public scrutiny.

60. Congressional critics also charged that faulty data had been used to reach the 1988 final closure recommendations.

61. Congress believed that the General Accounting Office ("GAO") should have reviewed the data considered by the 1988 Commission on Base Realignment and Closure.

62. On January 29, 1990, Secretary of Defense Cheney announced a proposal to close 36 bases in the United States, including the Shipyard.

63. In connection with that proposal, the Vice Chief of Naval Operations conducted a study to justify the proposed closure. This study concluded that the Shipyard should not be closed.

64. On November 5, 1990, to redress the criticisms raised by the 1988 base closure process, the President signed into law the Base Closure Act.

65. The Base Closure Act:

(a) Expressly stated that its "purpose" was "to provide a *fair process* that will result in the timely closure and realignment of military installations" [10 U.S.C. § 2901(b) (emphasis supplied)];

(b) Required that all meetings of the Commission "be open to the public," except where classified information was being discussed [10 U.S.C. § 2902(e)(2)(A)];

(c) Mandated the development and application of "final criteria" for making the closure and realignment determinations [10 U.S.C. § 2903(b)(2)(A) and (c)];

(d) Mandated the creation of a six year force-structure plan for the Armed Forces for making the closure and realignment determinations [10 U.S.C. § 2903(a) and (c)];

(e) Required the Secretary of Defense to consider all military installations "equally" for closure or realignment [10 U.S.C. § 2903(c)(3)];

(f) Required the Secretary of Defense to transmit to the Commission "a summary of the selection process that resulted in the recommendation for [closure or realignment] of each installation, including a justification for each recommendation [10 U.S.C. § 2903(c)(2)];

(g) Required the Secretary of Defense to transmit to the GAO "all information used by the Department in making its recommendations to the Commission for closures and realignments," and required the GAO (i) to assist the Commission in its review and analysis of the recommendations made by the Secretary and (ii) to transmit to the Commission and to Congress "a report containing a detailed analysis of the Secretary's recommendations and selection process" 45 days *before* the Commission's report was to be transmitted to the President [10 U.S.C. §§ 2903(c)(4), 2903(d)(5)(A) and 2903(d)(5)(B)]; and

(h) Proscribed the Secretary of Defense from carrying out any closure or realignment recommendation before the earlier of (i) the enactment of a joint resolution by Congress disapproving the closure recommendations, or (ii) the expiration of a 45 day statutory period that commenced on the day that the President transmitted the recommended closure and realignment list to Congress. [10 U.S.C. § 2904(b)].

C. The Oversight Role of Congress Under the Base Closure Act

66. The April 1991 Base Closure and Realignment Report of the Department of Defense ("DOD") acknowledges the significant oversight role retained by Congress with respect to military installation closures and realignments:

- (a) Authority to disapprove by law the Secretary's final criteria;
- (b) Receipt of the Secretary of Defense's force structure plan;
- (c) Receipt of the Secretary's recommended closures and realignments;
- (d) The role of the General Accounting Office; and
- (e) The requirement that the Commission's proceedings, information, and deliberations be open, on request, to designated members of Congress.

D. The Evaluative and Oversight Role of the General Accounting Office Under the Base Closure Act

67. During the 1988 base closure process, Congress belatedly called upon the GAO to examine the 1988 commission's methodology, findings and recommendations.

68. Congress ensured an integral and timely role for the GAO during the 1991 base closure process.

69. The Secretary's April 1991 Base Closure and Realignment Report to the Commission described the GAO's essential role:

Public Law 101-510 provided for the General Accounting Office (GAO) to *monitor* the activities, *while they occur*, of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.

The GAO is required to provide the Commission *and the Congress* with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO report, due by May 15, 1991, is also intended to describe how the DOD selection process was conducted and whether it met the requirements of the Act. In addition, the GAO is required to assist the Commission, if requested, with its review and analysis of the Secretary's recommendations. (Emphasis supplied.)

70. Purporting to comply with Congressional mandates, the Commission stated at p. 1-5 of its July 1, 1991 Base Closure and Realignment Report to the President that the "GAO has been an integral part of the process."

E. The 1991 Defense Base Closure Commission

71. The Base Closure Act provides for an eight member Commission to conduct an independent, equal, lawful and fair process for closing and realigning military installations.

72. To ensure the independence of the Commission, the Base Closure Act requires that the President nominate commissioners only after consulting with the speaker of the House of Representatives concerning the appointment of two members, the majority leader of the Senate concerning two members, the minority leader of the House of Representatives concerning the appointment of one member and the minority leader of the Senate concerning the appointment of one member.

73. The President nominated former New Jersey Congressman James A. Courter as Chairman of the Commission and the following seven as members of the Commission: William L. Ball, III, former Secretary of the Navy; Howard H. (Bo) Callaway, former Secretary of the Army;

Duane H. Cassidy, former commander-in-chief of the United States Transportation Command of the Military Airlift Command; Arthur Levitt, Jr., chairman of the board of Levitt Media Company; James C. Smith II, P.E., formerly a member of the Secretary of Defense's 1988 Base Closure Commission; Robert D. Stuart, Jr., former chairman of the board of the Quaker Oats Company; and Alexander Trowbridge, former Secretary of Commerce.

74. These nominations were confirmed by the Senate.

75. On May 17, 1991, Alexander Trowbridge resigned from the Commission because of a conflict of interest arising out of his ownership of a majority of stock in certain companies that had significant Pentagon contracts. At least one other Commissioner, James C. Smith, II, is employed by a firm that has substantial military construction contracts with the pentagon. Nevertheless, Trowbridge was the only Commissioner to resign.

76. Section 2902 of the Base Closure Act requires that all vacancies be filled in the same manner as the original appointment.

77. In accordance with Congress' oversight role under the Base Closure Act, Alexander Trowbridge had been nominated by the President after consultation with Speaker Foley.

78. In violation of the Base Closure Act, Trowbridge's vacancy was never filled.

79. The Commission established four procedures for gathering evidence to review the DOD's base closure proposals: (a) 15 public hearings in Washington, D.C. to receive information from the DOD, legislators and other experts; (b) 14 regional and site hearings to obtain public comment; (c) site visits by the Commissioners of the major facilities proposed for closure; and (d) review by the Commission's staff of the Armed Services' processes and data.

80. Under the Base Closure Act, the Commission was required to submit its Report to the President by July 1, 1991, setting forth its findings, conclusions and recommendations for closures and realignments inside the United States.

F. The Department of Defense Base Closure Criteria and Process

81. The Base Closure Act directs the Secretary of Defense to: (1) develop selection criteria for making recommendations for the closure of military installations and to finalize such criteria after public comment; (2) provide to Congress (with the Department of Defense's budget request for fiscal year 1992) a six-year, force-structure plan for the Armed Forces; (3) submit to the Commission by April 15, 1991 a list of military installations recommended for closure or realignment "*on the basis of the force-structure plan and the final criteria*" [10 U.S.C. § 2903(c)(1) (emphasis supplied)]; and (4) make available to the Commission, the GAO and Congress "*all information*" used by the Department in making its recommendations to the Commission for closures and realignments" [10 U.S.C. § 2903(c)(4) (emphasis supplied)].

82. As part of the objective process for determining whether to close a military installation, the Base Closure Act required the Secretary of Defense to establish selection criteria to be used in making a closure recommendation.

83. In developing these criteria, the Secretary was required to publish proposed criteria in the *Federal Register* and solicit public comments.

84. The DOD published eight proposed criteria and requested comments on November 30, 1990.

85. The proposed criteria closely mirrored the criteria established for the 1988 Defense Secretary's Commission on Base Realignment and Closure. The only notable dif-

ferences were that priority consideration was given to military value criteria and payback was no longer limited to six years.

86. As a result of numerous public concerns raised about the criteria's broad nature and the need for objective measures or factors for the criteria, on December 10, 1990, the DOD issued a memorandum setting forth "policy guidance" and "record keeping" requirements to the Military Departments as follows:

The recommendations in the studies must be based on the final base closure and realignment selection criteria established under that Section [2903 of the Act]; and

The studies must consider *all* military installations inside the United States . . . *on an equal footing*, . . .

* * *

DOD components shall keep:

- Descriptions of how base closure and realignment selections were made, and how they met the final selection criteria;
- Data, information and analysis considered in making base closure and realignment selections; and
- Documentation for each recommendation to the Secretary of Defense to close or realign a military installation under the Act. (Emphasis supplied.)

87. On February 13, 1991, the DOD issued a memorandum setting forth "internal control" guidance to the Military Departments requiring implementation of an "internal control plan" which "at a minimum" was to include:

- Uniform guidance defining data requirements and sources for each category of base,

- Systems for verifying accuracy of data,
- Documentation justifying any changes made to data submissions, and
- Procedures to check the accuracy of the analysis made from the data provided.

88. The February 13, 1991 DOD Memorandum also provided the following procedures for evaluating closures and realignments: (a) if there was no excess capacity in a certain category, the bases in that category were exempted from closure; (b) if there was excess capacity and a base was recommended for closure or realignment, the Department's analysis must have considered all military bases within that category and any cross-categories; and (c) military bases could only be excluded from further review if they were militarily/geographically unique or mission essential such that no other base could substitute for them.

89. On February 15, 1991, the DOD published in the *Federal Register* eight proposed final criteria to govern the base closure and realignment process.

90. The first four criteria concerned "military value," and were to receive preference:

- (1) Current and future mission requirements and the impact of operational readiness of the Department of Defense's total-force.
- (2) The availability and condition of land, facilities and associated air space at both the existing and potential receiving locations.
- (3) The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.
- (4) The cost and manpower implications.

The fifth criteria concerned "return on investment":

- (5) The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of closure or realignment, for the savings to exceed the costs.

The final three criteria involved "impacts":

- (6) The economic impact on local communities.
- (7) The ability of both the existing and potential receiving communities' infrastructures to support forces, missions, and personnel.
- (8) The environmental impact.

91. The proposed criteria were subject to Congressional review between February 15, 1991 and March 15, 1991. The criteria became final on March 15, 1991.

G. The Necessity For The Navy To Develop And Implement An Internal Control Plan

92. The February 13, 1991 DOD Memorandum also required each Military Department to develop and implement an "internal control plan" to ensure the accuracy of data collection and analyses. At a minimum, the internal control plan was required to include (1) uniform guidance defining data requirements and sources for each category of base, (2) systems for verifying accuracy of data, (3) documentation justifying any changes made to data submissions, and (4) procedures to check the accuracy of the analyses made from the data provided.

93. The Navy failed to implement an "internal control plan" that ensured the accuracy of its data collection and analysis. The Navy did not prepare minutes of its deliberations on closures and realignments.

H. The Navy's Pre-Determination to Close the Philadelphia Naval Shipyard

94. On December 10, 1990, the DOD issued the exclusive procedures which the Military Departments were to follow in making defense base closure and realignment recommendations.

95. In accordance with the Base Closure Act, the procedures required that all military installations be considered *equally*, "without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department of Defense."

96. In blatant contravention of the express language of the Base Closure Act, its own internal procedures and clear Congressional intent to establish an objective and fair process, the Navy used a completely arbitrary, subjective process designed to justify a pre-determined conclusion to close the Shipyard.

97. Documents that were withheld by the Navy until after the close of the Commission's public hearings established that, as early as December 19, 1990—prior to the DOD's establishment of a force structure plan or final criteria for evaluating base closures—the Secretary of the Navy had already decided to close the Shipyard.

98. On December 19, 1990, Admiral Peter Hekman, then Commander of the Naval Sea Systems Command, wrote a memorandum to the Chief of Naval Operations urging the Navy's reconsideration of its decision to close the Shipyard:

While I realized that the *Secretary has been briefed and has concurred with the proposal to mothball Philadelphia Naval Shipyard*, I strongly recommend that *this decision* be reconsidered. It is more prudent to downsize Philadelphia Naval Shipyard . . .

Further, I recommend that the drawdown of Philadelphia Naval Shipyard to an SRF size shipyard not be done until FY 95, as the shipyard is required to support scheduled workload until that time. (Emphasis supplied.)

99. Although Admiral Hekman was responsible for oversight of all Naval Shipyards, the Navy refused to allow him to become a part of the base closure process.

100. Admiral Hekman retired from the Navy on or about May 1, 1991. After his retirement, Admiral Hekman was instructed by the Assistant Secretary of the Navy, Donald Howard, that he was *not* to testify before the Commission at the public hearings on the Philadelphia Naval Shipyard.

101. The Navy predetermination to close the Philadelphia Naval Shipyard is confirmed by its treatment of other Naval Shipyards during the base closure process.

102. Navy guidelines expressly prohibited non-emergency capital upgrades of any military installations on the 1990 Base Closure List during the 1991 base closure process.

103. Nevertheless, on February 4, 1991—one day prior to the commencement of the Navy's force structure review process—the Chief Naval Officer requested \$1.05 million to upgrade for nuclear certification a shipyard that was clearly subject to the base closure process: Long Beach Naval Shipyard.

104. Long Beach is the only shipyard other than Philadelphia that does not have a nuclear certification.

105. The Navy's decision to upgrade Long Beach not only violated its own guidelines but clearly establishes a predisposition by the Navy to close the Philadelphia Naval Shipyard.

I. The Navy Base Structure Committee's Blatant Disregard for its Own Evaluation Results

106. In December 1990, the Secretary of the Navy established a six-member Base Structure Committee ("BSC") to conduct a base structure review and to determine the Navy's closure and realignment candidates.

107. The BSC was charged with reviewing all installations inside the United States *equally*, "without regard to whether the installation was previously considered for closure or realignment."

108. By applying their admittedly subjective judgment, the BSC candidly admitted that it arrived at base closure decisions that "differed from the assessments one might make using the raw empirical data."

109. The BSC initially categorized all facilities according to function—e.g., Naval Air Stations, Naval Shipyards—to determine which categories possessed significant capacity.

110. The Navy then applied the eight selection criteria in two phases by assigning color codes to military bases in categories with excess capacity.

111. Phase I of the BSC's analysis required a consideration of the first four military criteria. After Phase I was completed, the Navy excluded those bases which it determined "were distinguished by virtue of their operational value," i.e. those that it gave an overall "green" rating under the first four military criteria.

112. Under the Navy's rating system, a "green" rating received one point, a "yellow" rating received two points, and a "red" rating (favoring closure) received three points.

113. The Navy's color-coded/point approach resulted in the following total point allocations to each of the eight Naval Shipyards in the United States:

<u>Shipyard</u>	<u>Points</u>
Puget Sound, WA	4
Norfolk, VA	5
Philadelphia, PA	6
Charleston, SC	6
Mare Island, CA	6
Pearl Harbour, HI	6
Portsmouth, ME	6
Long Beach, CA	7

114. Puget Sound received a "green" rating for each of the first four military criteria and was therefore excluded from further closure consideration.

115. In accordance with the BSC base closure criteria, the seven remaining Naval Shipyards should have been evaluated under the remaining four non-military criteria set forth in Phase II.

116. Using the BSC's own rating system, the Philadelphia Naval Shipyard should have been treated the same as Charleston, Mare Island, Pearl Harbor and Portsmouth and better than Long Beach.

117. Ignoring its own rating system and in blatant disregard of the statutory mandate that all bases be considered "equally," the Navy—for no apparent reason and without any supporting documentation or analysis—gave overall "green" ratings to three *undeserving* shipyards: Mare Island, which just like Philadelphia Naval Shipyard, received two "yellow" and two "green" ratings; Norfolk, which received three "green" and one "yellow" ratings; and Pearl Harbor, which received one "red" and three "green" ratings.

118. The BSC then arbitrarily, unilaterally and without reference to any one of the eight DOD criteria excluded all of the six nuclear-capable shipyards from any further review without providing any documentation or

analysis to justify a drydock need for nuclear ships as compared with conventional carriers.

119. This process left only Long Beach (which is one of two California shipyards) and Philadelphia for further review.

120. To circumvent the fact that Long Beach scored poorly in three of the four military criteria and overall had the worst rating of all eight Naval Shipyards, the BSC then excluded Long Beach from further consideration contending that *one* of the drydocks at that Shipyard could be used "to handle West Coast aircraft carriers (including CVN emergency work)." [Navy Report, Tab C, p. 10].

121. By this egregious process of elimination, the BSC was left with *only one yard* to consider for closure under the remaining four criteria, the Philadelphia Naval Shipyard. The BSC then performed a perfunctory application of the second four non-military criteria with respect to the Philadelphia Naval Shipyard to ensure its closure.

122. The Navy's misconduct with respect to consideration of the non-military criteria was equally egregious.

123. For example, the Navy represented to the GAO and the Commission that closure of the Philadelphia Naval Shipyard would only cost the government approximately \$129.8 million. [Navy Report, Tab C, p. 13]. It was not until *after* this lawsuit was filed that the Navy expressly requested and obtained the actual cost of closing the Philadelphia Naval Shipyard—an amount was "conservatively" estimated to be \$1 billion.

J. The Navy's Force Structure Plan

124. The Base Closure Act required the Navy to create a force-structure plan based on the Navy's inventory of its fleet and projections of work necessary to upgrade and maintain its fleet during a six year fiscal period. Base

closure recommendations and decisions were to be based on this plan, pursuant to Section 2903(a) and (c) of the Base Closure Act.

125. The Navy's force structure plan and conclusions regarding the Navy's drydock needs fall far short of the statutory requirements. The plan fails to provide the requisite specificity necessary to determine how many large drydocks, such as those at the Shipyard, the Navy will need from 1992 through 1997, including the number and types of ships that will remain in the fleet and the number of anticipated repairs, overhauls and refuelings required on those ships during the relevant time period.

126. In fact, the Navy's own April 1991 Report contradicts the conclusion that any of the Naval Shipyards should be closed.

127. The Navy's Report stated that the Navy is currently fully utilizing its drydocks "in excess of 100%." The Report also stated that the number of large amphibious ships is increasing and for 1994 and 1997 there will be insufficient naval drydocks to handle large carriers. [Navy Report, Tab C, p. 2].

128. In its Report, the Navy also determined that shipyard workloads would be virtually unaffected:

While the Navy fleet in general is downsizing by 19%, the types of ships worked on by the Naval Shipyards is downsizing by only 1%, and in some cases is increasing (large Amphibious and AEGIS ships). Thus, the need for certain facilities to accomplish this work is not diminished.

[Navy Report, Tab C, p. 2 (emphasis added)].

129. A March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to the Chief of Naval Operations confirmed that the Navy's utilization of shipyards for large amphibious ships and

other large vessels would be between 84.2% and 106.9% for fiscal years 1992 through 1997.

130. Since the Navy requires that Shipyards reserve 30% of their space for emergency repairs, it is clear that Shipyards, such as the *Philadelphia Naval Shipyard*, servicing large amphibious ships and other large vessels *will have no "excess" capacity during the relevant six year period and should have been excluded from further review under the base closure process.*

131. The Navy's failure to prepare and follow an adequate force structure plan substantially prejudiced Naval Shipyards, such as the Philadelphia Naval Shipyard, since Philadelphia has: (a) three of the Navy's five East Coast drydocks that are capable of handling large amphibious ships and other large vessels; and (b) two of only three East Coast drydocks capable of handling carriers.

132. A March 15, 1991 memo from Admiral Hekman to the Chief of Naval Operations recognized that "retention of a credible repair capability at Philadelphia for naval ships home ported in the Northeast area is the most cost effective solution." Admiral Hekman concluded that:

[T]he workload distribution for naval shipyard in the 90's supports full operations at Philadelphia through mid FY 95. As previously briefed, executing a realignment of Philadelphia Naval Shipyard in FY 93 will cause significant perturbations to carrier overhauling yard assignment and could result in an East Coast CV overhauling on the West Coast.

133. Despite express requests for the foregoing information by interested members of Congress, the Navy deliberately withheld the Claman and Hekman memoranda from the GAO, the Commission, Congress and the public until after the close of the public hearings.

134. The BSC submitted its recommendations, including its proposal to close the Philadelphia Naval Shipyard, to the Secretary of the Navy.

135. The Secretary of the Navy submitted BSC's nominated bases for closure and realignment to the Secretary of Defense.

136. On April 12, 1991, Secretary Cheney issued the DOD's Base Closure Report. The Report adopted the Navy's proposals and recommended 43 base closures, including the Philadelphia Naval Shipyard.

K. The May 16, 1991 General Accounting Office Report

137. The Base Closure Act provides for the GAO to monitor the activities of the Military Departments, the Defense Agencies and the Department of Defense in selecting bases for closure or realignment under the Act.

138. The GAO was required (a) to assist the Commission in its review and analysis of the Secretary of Defense's closure recommendations and (b) to provide the Commission and the Congress with a detailed analysis of the Secretary of Defense's recommendations and selection process. The GAO Report was also intended to describe how the DOD selection process was conducted and whether it met the requirements of the Act.

139. Despite the clear mandates of the Base Closure Act and the DOD's internal guidelines and regulations, the Navy failed to provide the GAO with sufficient documentation to support either its base closure process or its recommendations for closure.

140. The GAO's independent Report, entitled *Observations on the Analyses Supporting Proposed Closures and Realignments*, was issued on May 16, 1991, in accordance with the statutory mandate of the Base Closure Act. A copy of the relevant text of the GAO Report is annexed hereto as Exhibit A.

141. The GAO Report found that the Army and Air Force could document their use of the force-structure plan and the military value criteria. Therefore, the GAO concluded that the base closure recommendations made by the Army and Air Force were "adequately supported."

142. In stark contrast, the GAO concluded that the Navy's recommendations and processes were entirely inadequate.

143. The GAO Report concluded that the Navy did not offer sufficient documentation to prove whether or not its process followed the force structure and selection criteria, thereby preventing the GAO from evaluating the Navy's specific recommendations for closure:

We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.

Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures. [GAO Report at p. 46].

144. In addition to the lack of adequate documentation, and the absence of any internal control plan, the GAO determined that it could not evaluate the Navy's "methodology" for reviewing air stations, shipyards, or labs. [GAO Report at pp. 46-48].

145. Significantly, the GAO Report stated that, on May 7, 1991, the Navy's BSC informed the GAO that the BSC had ignored the data prepared by its working groups because of the BSC's view that "much of the data were

biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs." According to the BSC, it therefore relied on informal briefings and meetings, many of which were in closed executive sessions. [GAO Report at p. 46].

146. The GAO Report identified three additional deficiencies in the Navy's process for determining base closures: (1) insufficient justification to support "the basis for the [BSC's] military value ratings for Navy installations"; (2) the implementation and use of an inconsistent color coding system to rate military bases; and (3) the Navy's failure to assign responsibility for developing and implementing an internal control plan to ensure the accuracy of information used by the Navy in its base structure reviews. [GAO Report at p. 48].

147. The GAO also discovered that, despite DOD guidance to the contrary, the Navy used budget data which did not use 1991 dollars as its baseline.

148. The GAO discovered inconsistencies in the Navy's service costs, savings estimates, payback calculations and recovery of closure costs. The GAO report concluded that the result of these inconsistencies was an overstatement of estimated annual savings and a shortening of the payback period for several closures.

149. The GAO Report also identified inconsistencies within the BSC's internal rating process, including the fact that the BSC had given identical ratings to two naval bases (Mare Island and Philadelphia Naval Shipyard) on each of the first four military selection criteria, but—without any discernable justification—had arbitrarily assigned an overall rating of green to one (Mare Island) and yellow to the other (Philadelphia Naval Shipyard). [GAO Report at p. 48].

150. Similarly, the BSC had assigned identical ratings to five naval bases but did not treat such bases equally.

Again, the Philadelphia Naval Shipyard was not excluded from the closure process although four other naval shipyards which received identical ratings were excluded from further review.

151. The GAO Report concluded that, since the BSC "did not document these differences," the GAO "could not determine the rationale for its final decisions" and "could not comment on the Committee's closure and realignment recommendations based on the process." [GAO Report at p. 48].

152. In sum, the GAO Report found that the Navy and its BSC:

- (a) Had not treated all bases equally, as required by the Base Closure Act;
- (b) Had not complied with the Secretary of Defense's first four military selection criteria, as required by the Base Closure Act;
- (c) Had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements; and
- (d) Had prevented the GAO from performing its statutory mandate of reviewing and analyzing the recommendations for Naval base closures made by the Secretary of Defense and transmitting to Congress and the Commission a report containing a detailed analysis of the Secretary of Defense's recommendations for Naval base closures and the Navy selection process.

L. Public Hearings

153. The Base Closure Act established the 1991 Defense Base Closure and Realignment Commission to ensure that "the [base closure] process is open." [Report to President, p. 1-5].

154. The Base Closure Act therefore requires the Commission to conduct its proceedings in public and open its records and deliberations to public scrutiny.

155. The Commission expressly invited and received public testimony in Washington, D.C. from members of Congress.

156. By letter dated April 23, 1991, the Commission established five pages of procedures to govern Congressional testimony at the Commission's hearings. The Commission's procedures provided that:

All members of Congress have the opportunity to testify before the Commission in Washington D.C. Members of Congress will have the opportunity to make introductory comments at regional hearings. However, their formal oral testimony and comments for the record should be presented at the Washington, D.C. hearing.

157. The Commission's official procedures also provided that the "recommended deadline for receipt of written material is May 20 to ensure that the Commission has adequate time to review all written documentation."

158. In accordance with the Base Closure Act, the Commission scheduled and held 28 hearings across the United States.

159. Congressional testimony on the Philadelphia Naval Shipyard was scheduled in Washington, D.C. for May 22, 1991. The regional hearing regarding the Philadelphia Naval Shipyard was scheduled for May 24, 1991.

160. In violation of the Base Closure Act and other applicable law, additional documentation was thereafter provided to the Commission that was not subject to GAO analysis or public comment and debate.

161. In blatant violation of the Base Closure Act, closed meetings with the Navy's BSC were held by the

Commission on May 24, 1991 *after* the public hearings were completed.

162. Moreover, on May 24, 1991—*after* the close of the public hearings—the Commission requested that the Navy's BSC provide it with additional information to "try to resolve missing gaps in the information provided."

163. Thereafter, the Navy's BSC provided additional documents and information to the Commission, including COBRA analyses, data underlying the color coding ratings, data regarding the VCNO study and other information regarding Navy closure recommendations, without affording interested members of Congress or the public a meaningful opportunity to comment on such information at a public hearing.

164. Despite repeated demands by members of Congress for a public hearing on the additional information supplied by the Navy, the Commission refused to allow any public debate.

M. The July 1, 1991 Commission Report To The President

165. On July 1, 1991, the Commission submitted its recommendations for the closure or realignment of U.S. military installations to the President.

166. In its July 1, 1991 Report to the President, the Commission stated:

The Navy presented a special challenge to the Commission. Its selection process was more subjective and less documented than that of either the Army or the Air Force. To determine whether the Navy complied with the law, the Commission's staff held a series of meeting with members of the Navy's Base Structure Commission and other high ranking naval officers

...

* * *

These individuals responded to questions and supplied information to the Commission.

167. The Commission findings with respect to the Philadelphia Naval Shipyard were as follows:

The Commission found that the overall public shipyard workload is falling significantly because of force reductions and budget limitations. The projected workload in nuclear shipyards during the 1990s was found to limit the potential for closing any nuclear shipyard until the late 1990s.

The largest portion of Philadelphia's recent workload has been CV-SLEP, which the Navy desires to terminate. However, Congress has passed legislation that requires a CV-SLEP at Philadelphia. The Commission found that this CV-SLEP should be completed in mid-1996, about a year before the required closure date.

Workload is available that could be diverted from public and private East Coast shipyards to Philadelphia to bring its activity up to levels that justify keeping it open. However, this would limit the Navy's ability to meet its target of putting 30 percent of its repair work in private yards . . .

* * *

The Commission found that the combination of carrier-capable drydocks at Norfolk Naval Shipyard, *Newport News Shipbuilding*, and the mothballed drydocks at Philadelphia provide capacity for unplanned requirements.

168. The Commission exceeded its statutory authority in making base closure recommendations by considering the availability of privately-owned shipyards, such as Newport News, to provide emergency service for the Navy's fleet.

169. Consideration of private facilities as part of a force-structure plan to provide emergency service for the Navy's fleet is impermissible under the Base Closure Act and departs from long standing Navy strategic and operational requirements.

170. The Navy was fully aware of the need to keep the Philadelphia Naval Shipyard open, but withheld such information from the GAO, the Commission and the public. The March 1991 Admiral Claman memorandum to the Chief of Naval Operations clearly recognized that:

Closure of Philadelphia Naval Shipyard, without retention of the large carrier capable dry docks creates a shortfall in dry dock capability for emergent dockings of aircraft carriers . . . Without the dry docks available at Philadelphia, the only other dock capable of taking an emergent carrier docking is at Newport News Shipbuilding (NNSB). Exhibit C-7 illustrates this situation graphically. This dock is privately owned and its docking schedule is not controlled by the Navy. The cost to have NNSB provide a dedicated dock under contract is considered prohibitive.

171. The Commission adopted the BSC's conclusion that the Shipyard should be closed based upon projected workload trends. However, the Navy's force structure plan lacked sufficient detail for the Commission to evaluate the Secretary's recommendations.

172. The law requires the President to approve or disapprove the Commission's recommendations by July 15, 1991. If approved, the report will be sent to Congress. Unless Congress enacts a joint resolution disapproving the Commission's proposals within 45 legislative days (or prior to when Congress adjourns for the session), the Secretary must begin to close or realign those installations listed in the report.

173. In fact, the Navy failed to produce, and the Commission failed to obtain, detailed information about projected Naval Shipyard workloads.

174. The Navy failed to engage in a fair and objective process and did not treat all military installations equally in recommending the closure of the Shipyard.

175. The Navy deviated substantially from the force structure plan and base closure criteria in recommending the closure of the Shipyard.

176. The Navy failed to base its decision on each of the final selection criteria and failed to apply each of the eight criteria equally, fairly and objectively.

177. The Navy failed to provide *all* information used in making its base closure recommendations to the GAO and members of Congress and failed to consider all available information concerning the Shipyard, especially information which would have prevented the BSC from recommending its closure.

178. The Navy deliberately manipulated data relating to the Philadelphia Naval Shipyard's workload to create a false lack of work or "excess capacity" at the Shipyard. Despite a Congressional mandate that a 24 month SLEP of the USS Kennedy be performed at Philadelphia, the Navy excluded the USS Kennedy from the data that was transmitted to the GAO and the Commission that set forth Philadelphia's projected workload in order to justify closure of the Philadelphia Naval Shipyard.

179. A further example of data manipulation is the workload comparison between Philadelphia and Long Beach. Unlike the Navy's scheduling of the workload for shipyards on the West Coast (Long Beach), on the East Coast, the Navy deliberately refrained from formally assigning a large number of ships and vessels that are to be scheduled for work in Naval shipyards (i.e. Philadelphia), leaving such ships in a "to be determined" category.

180. The Commission's adoption of the DOD's recommended base closures and realignments also violated the procedural and substantive safeguards set forth in the Base Closure Act with respect to other military installations, including its recommendations to close the Philadelphia Naval Station and the realignment and elimination of the Warminster Naval Air Development Center and the U.S. Army Corps of Engineers division and district management headquarters located in the Commonwealth of Pennsylvania.

181. The foregoing actions of the defendants are in bad faith, arbitrary, capricious and in violation of the law.

N. Irreparable Injury

182. On Wednesday, July 10, 1991, the President transmitted to Congress his approval of the Base Closure Commission's list of recommendations for base closure and realignment.

183. On Thursday, July 11, 1991, a joint resolution to disapprove the recommendations of the Base Closure Commission was introduced by Senator Specter in the Senate and referred to its Committee on Armed Services.

184. The Base Closure Act proscribes the Secretary of Defense from carrying out any closure or realignment recommendation until after the expiration of the statutory time period for Congressional approval or disapproval of the joint resolution. [10 U.S.C. § 2094(b)].

185. Flouting the statutory mandates of the Base Closure Act—which were designed to remove from the armed forces discretion that had previously resulted in the indiscriminate closure of military installations—the Navy unlawfully predetermined that it would close the Philadelphia Naval Shipyard and engaged in egregious and deliberate conduct designed to prevent Congressional or judicial interference with such closure.

186. The Navy's plan to prevent Congressional or judicial interference with *its* decision to close the Philadelphia Naval Shipyard included, *inter alia*, a scheme to immediately "starve" the Shipyard to death by removing all of its incoming workload.

187. In April 1991 — before the Commission had even commenced its deliberations on the Navy's recommendations — the Navy removed the following ships and vessels from the Philadelphia Naval Shipyard's workload schedule:

<u>Ship</u>	<u>FY</u>	<u>Est. Overhaul</u>	<u>Reassignment</u>
USS SAIPAN (LHA2)	94	11 months	to Norfolk
USS CANOPUS (AS34)	95	4 months	to Charleston
USS SARATOGA (CV 60)	95	12 months	to Norfolk
USS AMERICA (CV 66)	96	24 months	to Norfolk
USS SIMON LAKE (AS33)	97	4 months	to Charleston
USS FORRESTAL (AVT59)	98	11 months	to Norfolk

188. Since Shipyard workers who are employed by the various planning groups typically work on ships and vessels which are not scheduled to arrive at the Shipyard for one to three years, the significance of reassigning the above workload is that Philadelphia will be compelled to immediately begin layoffs of its highly skilled trades people and workers.

189. The above reassignments were made without consideration as to the increase in costs for the newly designated shipyards to overhaul or decommission the ships or whether such shipyards had the necessary drydock space to perform such work, and manifests a clear intent by the Navy to insulate its decision to close the Shipyard from review by Congress or the Courts.

190. In April 1991, the Navy also attempted to officially remove from the Philadelphia Naval Shipyard's workload, the USS KENNEDY (CV67), a 24 month SLEP

expressly authorized by Congress to be performed in Philadelphia.

191. On or about July 10, 1991, the Navy requested that the Senate Armed Services Committee deauthorize the 1991 and 1992 appropriations regarding the SLEP of the USS Kennedy.

192. Despite the fact that, prior to the enactment of the Base Closure Act, the Navy consistently maintained the need to perform a "SLEP," not an overhaul, on the USS Kennedy, the Navy now represents to the Senate Armed Services Committee that it only intends to do a complex overhaul on the USS Kennedy in Norfolk, Virginia.

193. The Senate Armed Services Committee, of which Senator Warner of Virginia is the ranking minority member, recommended approval of the deauthorization. Congress has not yet acted on the recommendation.

194. The Navy's imminent intent to make closure of the Philadelphia Naval Shipyard irreversible, and its improper manipulation of data, is further established by the Navy's misconduct with respect to the Navy's award of ship overhaul contracts that are subject to public/private competition under the Competition in Contracting Act.

195. Congress has statutorily recommended that 30% of all overhauls and repairs of ships and vessels be subject to public/private competition to reduce costs to the taxpayer and require efficiencies in the Government. This guideline has historically been adhered to by the armed services.

196. Pursuant to the Competition in Contracting Act, the Navy recently placed five ships up for bid in the public/private sector: USS Sprague, USS Patterson, USS Hailey, USS Rodgers and the USS Daniels.

197. Despite the fact that the Philadelphia Naval Shipyard was the lowest bidder on all but one of the public/

private bid packages, the Shipyard was *not* awarded *any* of these contracts.

198. The Navy, through NAVSEA, engineered this unfair result by arbitrarily imposing unprecedented charges on the Shipyard and creating unjustified and specious deficiencies in the Shipyard's bid proposals.

199. The Navy has also ceased sending information regarding future bids in the public/private competition sector to the Philadelphia Naval Shipyard.

200. For example, the Navy failed to notify the Shipyard of a June 18-19, 1991 AEGIS Fleet Support Review at which current and future shipyard work of AEGIS vessels was discussed and preliminarily planned. The Navy did, however, invite *private* shipyards to that meeting.

201. The foregoing clearly establishes the Navy's determination to prevent *any* work from coming into the Shipyard.

202. On or about July 3, 1991, NAVSEA gave the Commander of the Philadelphia Naval Shipyard Reduction In Force ("RIF") authorization, and the Shipyard began training its personnel in RIF programs to implement the layoffs.

203. Under normal Navy procedure, it does not give RIF authority or training unless a base closure process has already been implemented.

204. At least 1400 layoffs are scheduled during the first half of the next fiscal year with 400 of these layoffs to occur on September 13, 1991.

205. The foregoing conduct of defendants will cause plaintiffs to suffer immediate and irreparable harm.

206. According to the Navy's December 1990 Final Environmental Impact Statement for Base Closure/Re-alignment of the Philadelphia Naval Shipyard ("FEIS"), the direct economic consequence of the proposed closure of the Philadelphia Naval Shipyard includes a reduction in

present Navy employment in the Philadelphia region (which includes areas in the States of Pennsylvania, New Jersey and Delaware) by 88 percent, which represents eliminating directly almost 15,000 employment positions and indirectly causing the loss of an additional 7,384 jobs in the Philadelphia area.

207. The FEIS stated that the proposed closure would add an estimated 16,856 workers to the unemployment rolls (a 17.4 percent increase) and increase unemployment in the geographical region from 3.8 percent (in 1989) to 4.5 percent of the work force.

208. The FEIS also stated that "many employees of Philadelphia Naval Shipyard would experience difficulty reentering the labor force without considerable retraining."

209. According to the FEIS, the closing of the Philadelphia Naval Shipyard will cause a substantial increase in unemployment and a migration of Navy Shipyard employees from New Jersey and Pennsylvania to other states in search of job opportunities along with a consequent decrease in regional and state income and overall tax revenues for these states.

210. According to the FEIS, direct income and expenditures that would be withdrawn from the Philadelphia region as a result of the proposed closure would total \$536.9 million.

211. An Economic Impact Report prepared by the Pennsylvania Economy League ("PEL") and submitted to the Naval Facilities Engineering Command on October 17, 1990 by the Commonwealth of Pennsylvania and the State of New Jersey concluded that closing the Philadelphia Naval Shipyard would have a much greater impact on the economy of Philadelphia and the entire tri-state region than that set forth in the FEIS since the Shipyard is the largest employer in the Philadelphia area.

212. Economic activity connected with the Philadelphia Naval Shipyard accounts for \$2.1 billion in gross product in the Philadelphia metropolitan statistical area. This represent 1.45 percent of the region's total economic activity.

213. The PEL's Economic Impact Report concluded that the unemployment rate would jump 25 percent from 5.8 to 7.6 percent in the Philadelphia region, that the region would suffer a loss of \$915 million in wage and salary income and retail sales would decline \$382.8 million.

214. Plaintiffs do not have an adequate remedy at law.

215. There is presently an actual controversy between the parties, within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

COUNT I

All Plaintiffs

v.

**The Secretary of Defense and
The Secretary of the Navy**

216. Plaintiffs incorporate herein by reference paragraphs 1 through 215 above, as if fully set forth herein.

217. The Secretary of Defense, by and through his agent the Secretary of the Navy, adopted the list of closure and realignment recommendations made by the Navy's BSC in violation of the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

a. They failed to make available to the Commission, the GAO and Congress all information which was used by the Navy in making its recommendations to the Commission, in violation of Section 2903(c)(4) of the Base Closure Act;

b. They failed to provide the GAO with the data necessary for the GAO to perform its statutorily mandated duty to assist the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense, in violation of Section 2903(d)(5)(A) of the Base Closure Act;

c. They failed to provide the GAO with the data necessary for the GAO to perform its statutorily mandated duty to prepare and transmit to Congress and the Commission a detailed review and analysis of the Navy's and the Secretary of Defense's recommendations for Naval base closures and the procedures employed by the Navy and the Secretary of Defense in arriving at such recommendations, in violation of Section 2903(d)(5)(B) of the Base Closure Act;

d. They failed to publish in the Federal Register and transmit to the congressional defense committees and to the Commission a summary of the selection process that resulted in the recommendation for closure for each installation, together with a justification for each recommendation, in violation of Sections 2903(c)(1) and (2) of the Base Closure Act;

e. They failed to consider all Naval installations inside the United States equally, without regard to whether the installations has been previously considered or proposed for closure or realignment, in violation of Section 2903(c)(3) of the Base Closure Act;

f. They failed to apply the eight final criteria adopted by DOD equally to all Naval installations in making their recommendations for Navy base closures, in violation of Section 2903(c)(1) of the Base Closure Act;

g. They utilized criteria which were not published and adopted in accordance with Section 2903 of the Base Closure Act;

h. They failed to implement record keeping and internal controls promulgated by DOD in order to insure an accurate and fair decision-making process, in violation of the Base Closure Act;

i. They failed to adopt a force structure plan for the Navy in compliance with Section 2903(a) of the Base Closure Act and failed to base their base closure recommendations on a force structure plan which complied with the Base Closure Act; and

j. In order to prevent judicial or legislative interference with their decision to close the Philadelphia Naval Shipyard, the Secretary of the Navy and the Secretary of Defense began diverting the Shipyard's workload and implementing other closure procedures prior to Commission, Presidential and Congressional review of all base closure recommendations.

218. The Secretary of the Navy's and the Secretary of Defense's actions were arbitrary and capricious, not in conformity with law and will inflict substantial irreparable harm on the plaintiffs for which there is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that the list of Naval closure and realignment proposals provided by the Secretary of the Navy and the Secretary of Defense to the Commission on April 12, 1991 was developed in a manner inconsistent with the requirements of the Base Closure Act and is therefore void;

b. Find and declare that the Secretary of the Navy's and the Secretary of Defense's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Navy's BSC was arbitrary and capricious, and otherwise not in conformity with law;

c. Pursuant to 5 U.S.C. § 706(2), hold unlawful and void that portion of the list of closure and realignment proposals, findings and conclusions which were submitted by the Secretary of the Navy;

d. Enjoin the Secretary of Defense and the Secretary of the Navy and their agents and employees from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy;

e. Require the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list;

f. Require the Secretary of the Navy to reschedule the workload at the Shipyard to reflect the Naval fleet schedule that existed prior to the enactment of the Base Closure Act;

g. Require the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with making funds available to the Philadelphia Naval Shipyard that have been otherwise authorized for overhaul of the ships and vessels that were scheduled for work in the Shipyard prior to the base closure process;

h. Enjoin the Secretary of the Navy from implementing any layoffs or "reduction in force" plans at the Shipyard pending a full and final hearing on the merits;

i. Enjoin the Secretary of the Navy from acting on its recent award of the bids on the USS Sprague and USS Patterson to private naval shipyards and requiring the Secretary of the Navy to reopen such bids to the public/private competition sector and to award such bid in compliance with the Competition in Contracting Act; and

j. Grant such other and further relief as this Court deems just and equitable.

COUNT II

All Plaintiffs

v.

The Base Closure Commission

219. Plaintiffs incorporate herein by reference paragraphs 1 through 218 above, as if fully set forth herein.

220. The Commission, in reviewing and makings [sic] its recommendations regarding the base closures submitted by the Secretary of the Navy, violated the procedural and substantive safeguards and requirements set forth in the Base Closure Act, in that:

a. It based its decision on a significant amount of substantive information supplied by the Navy which was not evaluated or even made available to the GAO or to Congress, in violation of the Base Closure Act;

b. It failed to ensure that the GAO performed its statutorily mandated duty of assisting the Commission in its review and analysis of the recommendations for base closures made by the Navy and the Secretary of Defense, in violation of Section 2903(d)(5)(A) of the Base Closure Act;

c. It failed to ensure that the GAO performed its statutorily mandated duty of preparing and transmitting to Congress and the Commission a report containing a detailed review and analysis of the Navy's and the Secretary of Defense's recommendations for Naval base closures and the procedures employed by the Navy and the Secretary of Defense in arriving at such recommendations, in violation of Section 2903(d)(5)(B) of the Base Closure Act;

d. It decided to adopt the list of closure and realignment recommendations made by the Navy's BSC even though the GAO had found that the Navy and its BSC: (i) had not treated all bases equally, as required by the Base

Closure Act; (ii) had not complied with the Secretary of Defense's first four military selection criteria, as required by the Base Closure Act; and (iii) had not complied with the Secretary of Defense's "record keeping" and "internal controls" requirements;

e. It failed to hold public hearings, in violation of Section 2903(d)(1) of the Base Closure Act, because it did not include certain pivotal information regarding the Navy's recommendations and selection process in the record until after the close of the public hearings;

f. It failed to consider all Naval installations inside the United States equally, without regard to whether the installations had been previously considered or proposed for closure or realignment, in violation of Section 2903(c)(3) of the Base Closure Act;

g. It failed to apply the eight final criteria adopted by DOD equally to all Naval installations in making its recommendations for Navy base closures, in violation of Section 2903(c)(1) of the Base Closure Act;

h. It utilized criteria which were not published and adopted in accordance with Section 2903 of the Base Closure Act; and

i. It exceeded its statutory authority in making Naval base closure recommendations by considering privately-owned shipyards.

221. The Commission's actions were arbitrary and capricious, not in conformity with law and will inflict substantial irreparable harm on the plaintiffs for which there is no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that the Navy's list of closure and realignment recommendations, submitted by the Commission to the President on July 1, 1991, was adopted by the Commission in violation of the Base Closure Act and is therefore void;

b. Find and declare that the Commission's adoption of the list of closure and realignment recommendations, findings and conclusions made by the Navy's BSC was arbitrary and capricious, and otherwise not in conformity with law;

c. Pursuant to 5 U.S.C. § 706(2), hold unlawful and void that portion of the list of closure and realignment recommendations, findings and conclusions which were submitted by the Secretary of the Navy and adopted by the Commission;

d. Enjoin the Secretary of Defense and the Secretary of the Navy and their agents and employees from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy;

e. Require the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list;

f. Require the Secretary of the Navy to reschedule the workload at the Shipyard to reflect the Naval fleet schedule that existed prior to the enactment of the Base Closure Act;

g. Require the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with making funds available to the Philadelphia Naval Shipyard that have been otherwise authorized for overhaul of the ships and vessels that were scheduled for work in the Shipyard prior to the base closure process;

h. Enjoin the Secretary of the Navy from implementing any layoffs or "reduction in force" plans at the Shipyard pending a full and final hearing on the merits;

i. Enjoin the Secretary of the Navy from acting on its recent award of the bids on the USS Sprague and USS Patterson to private naval shipyards and requiring the Secretary of the Navy to reopen such bids to the public/private

competition sector and to award such bid in compliance with the Competition in Contracting Act; and

j. Grant such other and further relief as this Court deems just and equitable.

COUNT III

Landry, Reil, IFPTE and MTC

v.

All Defendants

222. Plaintiffs incorporate herein by reference paragraphs 1 through 221 above, as if fully set forth herein.

223. The defendants' actions constitute a violation of the plaintiffs' rights to Due Process as guaranteed under the Fifth Amendment of the United States Constitution.

224. The Base Closure Act expressly entitles the plaintiffs to a "fair process" by which it will be decided which military installations should be closed. Additionally, the Base Closure Act entitles the plaintiffs to have the Philadelphia Naval Shipyard remain open and in operation unless and until it is determined, in accordance with the Base Closure Act, that the closure of the Shipyard is warranted.

225. The defendants' disregard of the procedure set forth in the Base Closure Act, as more fully described in Counts I and II of this Complaint, impermissibly interfered with the rights which were granted to the plaintiffs under the Base Closure Act, and constitute violations of the Due Process Clause of the United States Constitution.

WHEREFORE, plaintiffs respectfully request that this Court:

a. Find and declare that defendants' actions in developing, adopting, and concurring in the Navy's list of closure and realignment recommendations provided by the Commission to the President on July 1, 1991 violated the

plaintiffs' rights guaranteed by the Due Process Clause of the United States Constitution;

b. Pursuant to 5 U.S.C. § 706(2), hold unlawful and void that portion of the list of closure and realignment recommendations, findings and conclusions which were submitted by the Secretary of the Navy and adopted by the Commission;

c. Enjoin the Secretary of Defense and the Secretary of the Navy and their agents and employees from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy;

d. Require the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with the Philadelphia Naval Shipyard's ability to operate as if the base was not on the closure list;

e. Require the Secretary of the Navy to reschedule the workload at the Shipyard to reflect the Naval fleet schedule that existed prior to the enactment of the Base Closure Act;

f. Require the Secretary of Defense and the Secretary of the Navy to refrain from taking any action that interferes with making funds available to the Philadelphia Naval Shipyard that have been otherwise authorized for overhaul of the ships and vessels that were scheduled for work in the Shipyard prior to the base closure process;

g. Enjoin the Secretary of the Navy from implementing any layoffs or "reduction in force" plans at the Shipyard pending a full and final hearing on the merits;

h. Enjoin the Secretary of the Navy from acting on its recent award of the bids on the USS Sprague and USS Patterson to private naval shipyards and requiring the Secretary of the Navy to reopen such bids to the public/private competition sector and to award such bid in compliance with the Competition in Contracting Act; and

j. Grant such other and further relief as this Court deems just and equitable.

/s/ Bruce W. Kauffman

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DATED: JULY 19, 1991

VERIFICATION

Congressman Robert E. Andrews, being duly sworn according to law, deposes and says that he is a plaintiff herein, that he has read the foregoing Amended Complaint and that he knows the contents thereof are true and correct of his own knowledge, information and belief.

/s/ Robert E. Andrews

Rep. ROBERT E. ANDREWS

City of Washington
District of Columbia
Sworn to and subscribed
before me this 17th day
of July, 1991.

/s/ Vernon R. Greene

Notary Public
VERNON R. GREENE
Notary Public, Dist. of Columbia
Commission Expires April 30, 1995

EXHIBIT A

**UNITED STATES GENERAL ACCOUNTING OFFICE
REPORT TO THE CONGRESS AND THE
CHAIRMAN, DEFENSE BASE CLOSURE
AND REALIGNMENT COMMISSION**

May 1991

**MILITARY BASES
OBSERVATIONS ON THE
ANALYSES SUPPORTING
PROPOSED CLOSURES
AND REALIGNMENTS**

EXECUTIVE SUMMARY

PURPOSE

The Department of Defense (DOD) spends billions of dollars annually operating its military bases in the United States. Events taking place throughout the world and within the United States have caused a reevaluation of our military strategy, and U.S. forces are to be significantly reduced. DOD and the Congress both recognize that with a reduced force structure there is a need to close and realign military installations.

The Defense Base Closure and Realignment Act of 1990 (P.L. 101-510) established a new process for DOD base closure and realignment actions within the United States. The act established an independent Defense Base Closure and Realignment Commission and specified procedures that the President, DOD, GAO, and the Commission must follow, through 1995, in order for bases to be closed or realigned.

This report responds to the act's requirement that GAO provide the Congress and the Commission, by May 15, 1991, an analysis of the Secretary of Defense's April 12, 1991, recommendations of bases for closure and realignment and the selection process used. GAO also received numerous letters, requests, and materials in connection with this review from congressmen, state and local government officials, and private citizens; however, due to the lack of time available to respond to each of the issues raised, GAO has submitted the materials to the Commission for its use.

BACKGROUND

In 1988, the Secretary of Defense chartered the Commission on Base Realignment and Closure to review military installations within the United States for realignment and closure. Later that year the Commission recommended that 145 installations be closed or realigned. The Secretary of Defense and the Congress accepted all the Commission's recommendations.

The Secretary of Defense unilaterally recommended additional closures and realignments on January 29, 1990, as a result of the shrinking defense budget. The Congress subsequently passed the Defense Base Closure and Realignment Act of 1990, which halted any closure actions based on the January 29, 1990, list and required all installations in the United States to be compared equally against (1) criteria to be developed by DOD and (2) the future years' Force Structure Plan (fiscal year 1992 to 1997).

The final eight criteria against which the April 12, 1991, list of proposed military installation closures and realignments was to be measured included four related to the

military value of the installations and four others that addressed the number of years needed to recover the costs of closure and realignment; the economic impact on communities; the ability of both the existing and potential receiving communities' infrastructure to support forces, missions, and personnel; and the environmental impact. DOD guidance provided to the services directed that they give priority to the four criteria that addressed the military value of installations.

RESULTS IN BRIEF

GAO agrees that a reduced military force structure requires that military installations be closed and realigned. The DOD process, when properly implemented, allows for a reduction in the U.S. military base structure by emphasizing the military value of the installations. Indeed, DOD successfully nominated 43 bases for closure and 28 for realignment. This represents a significant start in the process to propose bases for closure and realignment every other year for the next 6 years.

The Army and the Air Force can document the use of DOD's Force Structure Plan and the four military value criteria in the selection process. GAO found some inconsistencies in the way they developed military value rankings for quantifiable attributes used to compare similar installations; however, GAO believes those inconsistencies were not significant. GAO considers the closure and realignment recommendations made by the Army and the Air Force to be adequately supported.

Although the Navy had insufficient documentation to support its efforts, which precluded GAO from evaluating the Navy's process, this does not mean that Navy bases should

not be closed. However, since the Navy did not document the rationale for its decisions, GAO was unable to analyze its specific closure and realignment recommendations. As an alternative means of evaluating the Navy's recommendations, GAO looked at ship berthing capacity in comparison to the Force Structure Plan. After analyzing capacity data, GAO found that the Navy will have significant excess berthing capacity if only the recommended facilities are closed. GAO found that changes have occurred in the strategic homeporting concept, which when combined with excess available pier space for berthing ships, supports the recommendation for fewer Navy bases.

Although recognizing that differences exist in the composition and functions of each service's bases, GAO is concerned that DOD's guidance allowed estimating processes and cost factors used by the services to vary. GAO analyzed the sensitivity of years to recover closing costs (the projected payback period) for each closure or realignment to 50 percent and 100 percent increases in one-time costs. The analysis showed that the payback period for many of the recommendations did not substantially increase. There are several recommended closure and realignment actions, however, where the payback is sensitive to one-time costs.

PRINCIPAL FINDINGS

The Army's Process and Recommendations

The Army established the Total Army Basing Study group in 1990 to develop a total Army basing strategy and then tasked it to recommend potential closures and realignments. The Army used a two-phased approach to evaluate potential bases for closure or realignment that was designed to treat all bases equally. In phase I, it categorized

all its installations by major mission categories and evaluated their military value in quantitative terms. The Army Audit Agency was involved in the process to review and verify data collected for the quantitative analysis. In phase II, the Army used the Force Structure Plan, the phase I results, and the major commands' future plans. It also considered (1) the economic payback for possible alternatives and (2) the socioeconomic and environmental impacts on the communities involved in the final proposed closures.

Because the Army's process was well documented, which enabled GAO to evaluate the process, and the Army Audit Agency provided a check in the process, GAO believes that the resulting recommendations were well supported.

The Air Force's Process and Recommendations

The Air Force process was designed to treat all bases equally, and the selections were based on DOD's criteria and the Force Structure Plan. The process emphasized the first four criteria, which address military value. Also, the judgments of the Secretary of the Air Force and individual members of the Air Force Base Closure Executive Group, which was supported by a working group, were a part of the process.

The Air Force initially identified all Air Force-owned property within the United States and then excluded 35 active component bases from the process after doing a (1) capacity analysis and (2) mission-essential analysis. The 51 remaining active component bases were then rated on the basis of approximately 80 subelements for DOD's eight criteria. The Air Force also considered Reserve Component bases for potential closure or realignment using a

slightly different process. As a result of these assessments, the Secretary of the Air Force then recommended closing 14 bases and realigning 1 base. GAO's analysis focused on the data supporting the closure or realignment decisions. Generally, GAO found that the rationale was adequately supported by documentation.

The Navy's Process and Recommendations

Due to inadequate documentation of the process used by the Navy, GAO was unable to independently evaluate the relative military value of the bases considered. Further, the Navy did not establish required internal controls to ensure the accuracy of the data used.

According to the Navy, it established a Base Structure Committee to conduct its closure process. The Committee decided that the input it received from its working group was biased in favor of keeping bases open. Thus, the Committee based its recommendations on information provided during meetings with various Navy and Marine Corps headquarters officials and representatives from various field organizations.

GAO's review of the Navy's ship berthing capacity studies found that there would be significant excess space beyond what the Committee calculated, even if the bases recommended for closure were included.

COBRA Model Used in Cost Savings Estimates

The revised Cost of Base Realignment Actions (COBRA) model addresses a full range of factors for estimating the costs, savings, and payback period related to closure and realignment actions. GAO found cases where the services used inaccurate data in the model. GAO also found that

the cost estimating process ignored the cost of Medicare to the federal government. However, overall, GAO believes that the recommendations made for base closings and realignments offer an opportunity for substantial savings.

DOD Did Not Ensure Cost Comparability

Without DOD oversight of the COBRA cost estimating process, each service approached common problems in different ways. Although DOD called for submission of cost estimates expressed in fiscal year 1991 dollars, the services used budget data for other than 1991 dollars as their baselines for estimating costs and savings. Service costs and savings estimates, as well as payback calculations, did not consistently rely on fiscal year 1991 input data. These errors could reduce estimated annual savings and lengthen the payback period for several closures.

RECOMMENDATIONS

GAO recommends that the Secretary of Defense

- require the Secretary of the Navy to submit to the Defense Base Closure and Realignment Commission specific details on the manner in which its Base Structure Committee compared bases to develop closure and realignment recommendations and
- ensure the use of consistent procedures and practices among the services in future base closure and realignment reviews.

GAO also recommends that the Chairman, Defense Base Closure and Realignment Commission,

- consider, in evaluating the Navy requirement for bases, the impact of excess space for ship berths on base requirements and

- consider for all the services the effects of incorrect cost and savings estimates on all proposed base closures and realignments, using the results of GAO's sensitivity analysis.

CHAPTER 4

THE NAVY'S BASE CLOSURE AND REALIGNMENT PROCESS AND ASSOCIATED RECOMMENDATIONS

We were unable to conduct an extensive review of the process the Navy used to recommend bases for closure or realignment, because the Navy did not adequately document its decision-making process or the results of its deliberations. In addition, the Navy did not establish an internal control plan to ensure the validity and accuracy of information used in its assessment as required by OSD.

Due to the limited documentation of its process, we also could not assess the reasonableness of the Navy's recommendations for closures. However, we reviewed and recalculated the Navy's ship berthing capacity analysis and found that excess capacity would remain, even with the closure of recommended bases.

THE NAVY'S PROCESS AS DESCRIBED BY NAVY OFFICIALS

The Navy's Base Structure Committee, which was charged with making base closure and realignment recommendations, began its review of the Navy's basing structure in late January 1991. However, the Committee did not fully explain its process to us until May 7, 1991, when it informed us that after review of data prepared by its working group, the Base Structure Committee decided that much of the data were biased in favor of keeping bases open and were inadequate for an objective assessment of the Navy's basing needs. Its review, therefore, emphasized a series of briefings and meetings attended by Committee members, Navy and Marine Corps headquarters officials, and representatives of field activities. According to Committee members, decisions made during the process were

sometimes made in the presence of everyone in the meetings and were clear to everyone in attendance. In other cases, the decisions were made by the Committee in closed executive sessions. Based on this review, the Committee proposed closure and realignment actions to the Secretary of the Navy on March 21, 1991.

We reviewed the charts that were used in the presentations to the Committee. These charts were generally in outline form. Our review of this information showed that presentations were organized by 23 Navy and 6 Marine Corps categories representing the various Navy functions and missions. For example, the category "naval stations" included bases that have deep water harbors and piers and serve as home bases for Navy surface ships and aircraft carriers. The category "naval air stations" included bases that have runways and hangars and serve as home bases for aircraft. Other categories included submarine bases, shipyards, aviation depots, supply centers/depots, Marine Corps bases, Marine Corps air stations, reserve centers, and RDT&E activities.

The Base Structure Committee told us that a capacity analysis was then discussed for each functional category, which compared the 1997 force structure facility requirements against the existing inventory. Critical factors were identified for each category and served as units of measure for capacity. For example, pier space was used as the primary unit of measure for naval stations, and airfield apron and hangar space were used for naval air stations.

Of the eight categories of bases the Committee retained for further closure and realignment analysis, four were retained because the Base Structure Committee identified

potential excess capacity: (1) naval stations, (2) naval air stations, (3) shipyards, and (4) Marine Corps air stations. Two other categories—the training and construction battalion centers categories—were retained for further analysis, because they showed potential excess capacity in segments of the overall categories. The medical category was also retained because of the link between medical facilities and major installations that were being evaluated for closure or realignment. Finally, the RDT&E category was retained for analysis based on a mandated requirement to reduce personnel by 20 percent.

A military value rating was then assigned by the Base Structure Committee to each base in all the categories being analyzed except for the medical category.¹ Committee members told us that they rated each installation using the first four DOD selection criteria, which addressed military value, and then they independently assigned each installation an overall color-coded rating.

Bases receiving an overall green rating were excluded from further study, according to Committee members. For example, in the naval stations category the bases receiving an overall green were Coronado, Guam, Ingleside, Little Creek, Mayport, Mobile, New York (Staten Island), Norfolk, Pascagoula, Pearl Harbor, Puget Sound/Everett, and San Diego. The Committee continued to evaluate bases that were given an overall rating of yellow or red. Additional bases were excluded from further review because of their unique assets, geographic location, strategic

¹ Three hospitals were reviewed because three installations with hospitals were being considered for closure: Orlando Naval Training Center, Whidbey Island Naval Air Station, and Long Beach Naval Station.

importance, or operational value, leaving 19 bases and the RDT&E category to be evaluated for closure.

Committee members told us they then performed a “quick estimate” cost-benefit analysis of each of the remaining bases to determine the feasibility of closing them. After making its final decisions, a full COBRA analysis for those closure candidates was conducted. Local economic and environmental impact analyses were also done for the closure candidates.

The Committee proposed closing 11 bases and 10 RDT&E facilities. It also recommended that 1 base and 16 RDT&E facilities be realigned. In addition, three hospitals were proposed to be closed as a result of the Committee’s decisions.

GAO’s VIEWS ON THE NAVY’S PROCESS

In addition to the limitations placed on our review by the lack of adequate documentation, we identified three problems with the Navy’s process. First, due to the lack of supporting documentation, we could not determine the basis for the Committee’s military value ratings for Navy installations. In late March, we received selected data given to the Committee by its Working Group. This information was provided to us, but we were not advised until May 7, 1991, that the Committee had decided that much of this data were biased in favor of keeping bases open. In mid-April, the Base Structure Committee provided us with four additional volumes of material that consisted primarily of briefing charts that were basically outlines of matters and data to be discussed, without any explanation or supporting data. Also, Committee members said they did not prepare minutes of their deliberations.

Second, we identified apparent inconsistencies within the Committee's internal rating process. For example, the Committee had given identical ratings to two naval stations on each of the first four DOD selection criteria but had assigned an overall rating of green to one and yellow to the other. Similarly, the Committee had assigned identical ratings to six naval air stations for the first four DOD selection criteria. Four bases were assigned an overall rating of yellow and two an overall rating of green. These inconsistencies are significant because any base given an overall rating of green, based on the first four DOD selection criteria, was excluded from further closure or realignment consideration. In explanation, Committee members stated that "not all yellows are equal" and "not all greens are equal." Since the Committee did not document these differences, we could not determine the rationale for its final decisions.

Lastly, although required by OSD policy guidance to develop and implement an internal control plan for its base structure reviews, the Navy did not assign responsibility for developing and implementing such a plan.

GAO's VIEWS ON THE CLOSURE AND REALIGNMENT RECOMMENDATIONS

Because the Committee did not document the rationale for its decisions, we could not comment on the Committee's closure and realignment recommendations based on the process. As an alternative, we looked at ship berthing capacity of naval stations in comparison to the Force Structure Plan because naval stations are a major category of the Navy's facilities. Also, we have conducted prior work and have ongoing work related to homeporting needs. Data obtained from the Navy's Assistant Chief of

Naval Operations (Surface Warfare) showed that the most appropriate indicator for naval station requirements is ship berthing capacity. An analysis of the capacity data showed the Navy will have excess capacity remaining if only the four recommended naval stations are closed.

The Navy's capacity analysis indicates an inventory of 257.6 thousand feet of berthing (KFB) at naval stations and a requirement of 174.2 KFB, leaving an excess of 83.4 KFB. This excess represents the capacity at naval stations worldwide and also includes some inadequate berthing space. In addition, 14.5 KFB of berthing space is available at facilities other than naval stations.

When we subtracted the 75.2 KFB identified with space associated with (1) overseas facilities, (2) recommended closures, and (3) inadequate berthing facilities, 22.7 KFB of excess berthing capacity remains (see table 4.1).

CERTIFICATE OF SERVICE

I, Camille J. Wolf hereby certify that on this 19th day of July 1991, I caused a true and correct copy of plaintiffs' Verified Amended Complaint to be hand delivered on the following counsel of record: Michael M. Baylson, Esquire, the United States Attorney for the Eastern District of Pennsylvania, David F. McComb, Assistant United States Attorney for the Eastern District of Pennsylvania, 3310 U.S. Courthouse, Independence Mall West, 601 Market Street, Philadelphia, Pennsylvania, 19106.

/s/ Camille J. Wolf
CAMILLE J. WOLF

Supreme Court of the United States

No. 93-289

JOHN H. DALTON, SECRETARY OF
THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ORDER ALLOWING CERTIORARI:
Filed October 18, 1993.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

October 18, 1993

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No. 93-289

Supreme Court, U.S.
FILED

DEC 2 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF
THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 (1990 Act), 10 U.S.C. 2687 note (Supp. IV 1992), establishes a mechanism to identify unneeded domestic military bases for closure and realignment. The questions presented are:

1. Whether the base closure and realignment recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission or the President's decision to accept or reject the Commission's recommendations is subject to judicial review under the principles set forth in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992).

2. Whether the Base Closure Act itself "preclude[s] judicial review" of statutory claims for purposes of the Administrative Procedure Act, 5 U.S.C. 701(a)(1).

PARTIES TO THE PROCEEDING

Petitioners herein, who were defendants below, are John H. Dalton, Secretary of the Navy; Les Aspin, Secretary of Defense; The Defense Base Closure and Realignment Commission; and its members—James A. Courter; Peter B. Bowman; Beverly B. Byron; Rebecca G. Cox; Hansford T. Johnson; Harry C. McPherson, Jr.; and Robert D. Stuart, Jr. All petitioners except James A. Courter and Robert D. Stuart, Jr. are substituted as parties pursuant to Rule 35.3 of this Court.

Respondents in this Court, who were plaintiffs below, are Sen. Arlen Specter; Sen. Harris Wofford; Sen. Bill Bradley; Sen. Frank R. Lautenberg; Governor Robert P. Casey; Commonwealth of Pennsylvania; Ernest D. Preate, Jr., Pennsylvania Attorney General; Rep. Curt Weldon; Rep. Thomas Foglietta; Rep. Robert Andrews; Rep. R. Lawrence Coughlin; City of Philadelphia; Howard J. Landry; International Federation of Professional and Technical Engineers, Local 3; William F. Reil; Metal Trades Council, Local 687 Machinists; Governor James J. Florio; State of New Jersey; Robert J. Del Tufo, New Jersey Attorney General; Governor Michael N. Castle; State of Delaware; Rep. Peter H. Kostmeyer; Rep. Robert A. Borski; Ronald Warrington; and Planners Estimators Progressman & Schedulers Union Local No. 2.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-289

JOHN H. DALTON, SECRETARY OF
THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 995 F.2d 404. A prior opinion of the court of appeals (Pet. App. 26a-82a) is reported at 971 F.2d 936. The opinion of the district court (Pet. App. 85a-91a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993. Pet. App. 92a-94a. The petition for a writ of certiorari was filed on August 23, 1993, and was granted on October 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Defense Base Closure and Realignment Act of 1990 (1990 Act), as amended, 10

U.S.C. 2687 note (Supp. IV 1992),¹ and relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 and 704, are reproduced at Pet. App. 98a-130a.

STATEMENT

A. Statutory Background

1. During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic military bases. See Defense Base Closure and Realignment Commission, *Report to the President 1991*, at 1-1 [hereinafter *1991 Report*]; H.R. Rep. No. 1233, 94th Cong., 2d Sess. 5 (1976) (2700 base reductions, closures, or realignments since 1969). Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress representing those areas. See, e.g., 122 Cong. Rec. 30,446-30,447 (1976) (Sen. Kennedy); *id.* at 30,453-30,455 (Sen. Muskie); *id.* at 30,456 (Sen. Brooke). In addition, opposition to base closures was fueled in part by the perception that the Executive's selection of bases was influenced by improper political considerations. See *1991 Report* at 1-1.

To address those concerns, Congress in 1977 enacted procedural restrictions on the Executive's authority to close or realign the size of military bases. Military Construction Authorization Act, 1978, Pub. L. No. 95-82,

¹ The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, has been amended in respects not relevant here. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b)(1), 105 Stat. 1345; Pub. L. No. 102-190, Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), 106 Stat. 2502; Pub. L. No. 102-484, Tit. XXVIII, § 2821(b), 106 Stat. 2607-2608. For simplicity, we refer to sections of the Base Closure Act as codified in 10 U.S.C. 2687 note (Supp. IV 1992).

§ 612, 91 Stat. 379-380 (1977), codified at 10 U.S.C. 2687 (Supp. I 1977).² That legislation required the Secretary of Defense or the pertinent service Secretary to give Congress and the public advance notice of potential military base closures or realignments. 10 U.S.C. 2687 (b)(1) (Supp. I 1977). Moreover, at least 60 days before implementing a final base closure decision, the Department of Defense was to submit a "detailed justification" to the Armed Services Committees of both Houses. 10 U.S.C. 2687(b)(3)-(4) (Supp. I 1977). Finally, the statute required the Department of Defense to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.*, before proceeding with base closures. 10 U.S.C. 2687(b)(2) (Supp. I 1977).

The 1977 legislation imposed no substantive restrictions on the Executive's authority to close bases. Its procedural requirements, however, posed significant obstacles. In particular, opponents of base closure used NEPA litigation to delay and frustrate the base closure process. See, e.g., H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988); H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 1, at 8 (1988); *id.* Pt. 2, at 16. Such procedural impediments effectively prevented the government from carrying out significant base closures. See *1991 Report* at 1-1; H.R. Rep. No. 735, *supra*, Pt. 1, at 8 (noting testimony of Secretary of Defense that the government is unable "to close or realign unneeded military installations because of impediments, restrictions, and delays imposed by provisions of current law").

2. Congress first sought to break the resulting stalemate by enacting the Defense Authorization Amendments and Base Closure and Realignment Act of 1988 (1988 Act), Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2627-2634 (1988). The 1988 Act is the direct predecessor

² The previous year, Congress had enacted similar restrictions as a condition on the expenditure of appropriated funds. See Military Construction and Guard and Reserve Forces Facilities Authorization Acts, 1977, Pub. L. No. 94-431, § 612, 90 Stat. 1366-1367.

to, and shares many basic features with, the statute at issue here. The 1988 Act established an independent Commission on Base Closure and Realignment. 1988 Act § 203, 102 Stat. 2627-2628. The Commission was charged with preparing a base closure report for the Secretary of Defense, who had no authority to close bases until after he approved the report and forwarded it to Congress. 1988 Act §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act also imposed a 45-day waiting period for Congress to enact a joint resolution of disapproval. 1988 Act § 202(b), 102 Stat. 2627.

The expedited report-and-wait mechanism was designed to eliminate the impediments created by the 1977 statute. See H.R. Rep. No. 735, *supra*, Pt. 1, at 8; *id.* Pt. 2, at 8. To that end, the 1988 Act not only made 10 U.S.C. 2687 inapplicable (1988 Act § 205(2), 102 Stat. 2630), but also explicitly exempted the base closure decisions of the Commission and the Secretary from NEPA. 1988 Act § 204(c)(1), 102 Stat. 2632; H.R. Rep. No. 735, *supra*, Pt. 1, at 10; *id.* Pt. 2, at 16; *id.* Pt. 3, at 4.³ Although House and Senate conferees endorsed NEPA's goals of "public disclosure and clear identification of potential adverse environmental impacts," they nevertheless restricted the applicability of NEPA because of the "recogni[tion] that [it] ha[d] been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra*, at 23.

B. The Defense Base Closure And Realignment Act Of 1990

The 1988 Act did not establish a permanent mechanism for closing and realigning military installations; it

³ In 1985, Congress revised 10 U.S.C. 2687 to eliminate the provision explicitly applying NEPA to base closures. See Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1202(a), 99 Stat. 716. NEPA, however, continued to apply of its own force to some aspects of the base closure process. Thus, Congress was required to take further action to immunize base closure selection decisions from NEPA review. See H.R. Conf. Rep. No. 1071, *supra*, at 22-23; H.R. Rep. No. 735, *supra*, Pt. 2, at 16.

provided a mechanism for only one round of base closures. Accordingly, Congress passed the 1990 Act to provide a more comprehensive mechanism for identifying and closing unnecessary domestic military bases. In doing so, Congress relied on the 1988 Act as "an example of the right way to close bases" and assumed that "[a] new base closure process will not be credible unless the 1988 base closure process remains inviolate." H.R. Rep. No. 665, 101st Cong., 2d Sess. 342 (1990).

The 1990 Act provides for three rounds of base closures,⁴ to take place in 1991, 1993, and 1995. § 2903(c)(1). For each round, the Secretary of Defense must submit a six-year "force-structure plan * * * based on an assessment * * * of the probable threats to the national security" during that period. § 2903(a). The Secretary also must establish, after notice and an opportunity for public comment, selection criteria for base closure recommendations. § 2903(b). Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. § 2903(c).

The 1990 Act requires the Secretary of Defense, by April 15 in 1991 (and by March 15 in 1993 and 1995), to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent body whose members are appointed by the President (after consultation with specified congressional leaders), with the advice and consent of the Senate. §§ 2902(a), 2903(c)(1). The Commission is charged with holding public hearings and then preparing a report

⁴ The Base Closure Act also governs so-called "realignments," which include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." § 2910(5). For convenience, we use the term "base closures" to refer to both base closures and realignments.

containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. § 2903(d)(1) and (2). The Commission may change the Secretary's recommendations if it determines that the Secretary has "deviated substantially" from the force-structure plan and the selection criteria. § 2903(d)(2)(B) and (C). The Commission must then forward its report to the President by July 1. § 2903(e).

The President may approve or disapprove the Commission's recommendations, and must transmit his determination to Congress and the Commission by July 15. § 2903(e)(1)-(3). If the President disapproves its recommendations, the Commission must prepare new recommendations and resubmit them to the President no later than August 15. § 2903(e)(3). If the President disapproves the revised recommendations (or takes no action by September 1), no bases may be selected that year for closure under the Act. § 2903(e)(5).

If the President approves the initial or revised recommendations, he must certify his approval to Congress, which reviews the President's decision through the mechanism of considering a joint resolution of disapproval. §§ 2904(b), 2908. If a joint resolution of disapproval is enacted, the Secretary of Defense may not close or realign the bases approved by the President. § 2904(b). If a joint resolution is not enacted within 45 days or by the date Congress adjourns for the session, whichever is earlier,⁵ the Secretary must close or realign all of the military installations approved by the President for closure or realignment. § 2904(a), (b)(1).

The 1990 Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in

⁵ To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate usual delays. § 2908.

carrying out [the 1990 Act]." § 2905(c)(1). The 1990 Act does allow NEPA review of steps taken to implement base closure decisions *after* bases have been selected for closure. See § 2905(c)(2)(A) (NEPA applies to decisions made "during the process of property disposal[] and * * * relocating functions"). But it strictly requires such post-selection NEPA suits to be filed within 60 days of the disputed action. § 2905(c)(3).

C. The Proceedings In This Case

1. a. On April 15, 1991, the Secretary of Defense transmitted to the Commission a list of domestic military installations for closure or realignment. That list included the Philadelphia Naval Shipyard. 56 Fed. Reg. 15,184 (1991). The Commission held public hearings in Washington, D.C., as well as in Philadelphia and elsewhere around the country, receiving testimony from Defense Department officials, legislators, and expert witnesses. Members of the Commission visited major facilities recommended for closure, including the Philadelphia Naval Shipyard. The Commission recommended closure or realignment of 82 bases. Those recommendations differed from the Secretary's in several respects, but the Commission concurred in the Secretary's recommendation to close the Philadelphia Naval Shipyard. Pet. App. 33a.

On July 10, 1991, the President approved the Commission's recommendations. J.A. 45. The Armed Services Committees of both Houses of Congress conducted hearings on the recommended closures. Pet. App. 33a-34a. On July 30, 1991, the House of Representatives entertained a resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing debate, several of the respondent Members of Congress urged adoption of the resolution because of alleged flaws in the procedures through which the Philadelphia Naval Shipyard was recommended for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The House,

however, ultimately rejected the resolution of disapproval by a vote of 364 to 60. *Id.* at H6039; Pet. App. 34a.

b. On July 8, 1991, respondents filed this action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the 1990 Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. J.A. 12, 53, 56, 58.⁶ Respondents did not name the President as a defendant, nor did they allege that he violated the 1990 Act or otherwise acted improperly.

Respondents' complaint set forth three counts, two of which remain at issue here.⁷ Count I alleged that the Secretary of the Navy and the Secretary of Defense violated substantive and procedural requirements of the 1990 Act in deciding to recommend the Philadelphia Naval Shipyard for closure. J.A. 50-53.⁸ Count II made simi-

⁶ Respondents are Members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials thereof; the City of Philadelphia; and several local unions and their presidents. See Pet. App. 33a.

⁷ Count III alleged that petitioners denied respondents due process by depriving them of process rights allegedly guaranteed under the 1990 Act. J.A. 57. In its initial decision, the court of appeals held that respondents had identified no "legitimate claim of entitlement under the Act" and had failed to state a claim under the Due Process Clause. Pet. App. 69a. Respondents did not seek further review of that ruling, and it is not presented here.

⁸ Respondents alleged that the Navy developed a deficient force structure plan (J.A. 33-35, 52); deviated substantially from the force structure plan and base closure criteria (J.A. 44); disregarded its own objective ratings (J.A. 33-33, 44); used unpublished selection criteria (J.A. 51); concealed its real reasons for selecting the Philadelphia Naval Shipyard (J.A. 51); withheld data from the General Accounting Office (GAO), the Commission, and Congress until after public hearings ended (J.A. 35, 43, 44, 50); failed to provide the GAO with sufficient documentation of its decision (J.A. 36, 37, 51); and failed to comply with Department of Defense directives concerning record keeping and "internal control plans" (J.A. 28, 52).

lar allegations concerning the Commission's preparation of its recommendations to the President. J.A. 54-57.⁹

On November 1, 1991, the district court dismissed the suit in its entirety (Pet. App. 85a-91a), concluding that the 1990 Act itself "precludes judicial review" for purposes of the APA, 5 U.S.C. 701(a)(1). Pet. App. 85a-88a. In the alternative, the court held that the political question doctrine forecloses review of base closure decisions. *Id.* at 88a-91a.

2. a. On April 17, 1992, a divided panel of the court of appeals affirmed in part and reversed in part. See Pet. App. 26a-82a.¹⁰ As a preliminary matter, the court of appeals considered whether the actions at issue constitute "final agency action" within the meaning of the APA, 5 U.S.C. 704. Although respondents were challenging the acts or omissions of the Secretary of Defense and the Commission in making their recommendations, the court reasoned that "at least in one sense, we are here asked to review a presidential decision." Pet. App. 43a. Because the Secretary and the Commission have authority only to make recommendations under the Act, the court reasoned that respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. *Id.* at 42a. The court recognized that the

⁹ Respondents alleged that the Commission used improper criteria such as the availability of private shipyard capacity (J.A. 42-42, 55); failed to consider all Navy installations equally (J.A. 55); adopted the Navy's recommendations even though the Commission knew of deficiencies in the Navy's decisionmaking process (J.A. 54-55); held closed meetings with the Navy after the completion of public hearings (J.A. 40-41); relied on Navy documentation that was not subject to GAO review or public comment (J.A. 40-41, 54); did not place certain information in the record until after the close of public hearings (J.A. 55); and failed to ensure that the GAO carried out its duties under the Act (J.A. 54).

¹⁰ The court of appeals held that the respondent union members and Philadelphia Naval Shipyard employees had standing to challenge the base closure. Because the legal contentions of all of the respondents were the same, the court declined to address the standing of the other respondents. Pet. App. 36a-39a.

APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that Act. *Id.* at 43a. Nevertheless, it concluded that the APA's judicial review provisions "represent[] a codification of the common law" and that the actions of the President are not, as such, immune from judicial review at common law. *Ibid.*

The court of appeals further held that the 1990 Act itself precludes judicial review of some, but not all, claims under the Act. First, the court held that no judicial review of decisions under the Act is available prior to the effective date of the President's decision, *i.e.*, until after expiration of the 45-day period for congressional review under Section 2904(b). The court explained that the Act sets a very stringent timetable and that "the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention." Pet. App. 44a-45a.

Second, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found that the substance of the President's base closure decision "is committed by law to presidential discretion." Pet. App. 46a. Similarly, the court determined that judicial review is unavailable to the extent that it relates to the merits of base closure recommendations prepared by the Secretary and the Commission. *Id.* at 56a-60a, 61a-62a.

At the same time, the court concluded that the 1990 Act does not preclude judicial review of compliance by the Secretary or the Commission with its procedural provisions. Pet. App. 60a-62a. Specifically, the court held that judicial review is available for respondents' claims that: (1) the Secretary failed to transmit to the Commission and the GAO all of the information that the Secretary used in making his recommendations; and (2) the Commission did not hold public hearings as required by the Act. *Id.* at 60a, 62a & n.15.

Finally, the court rejected the claims of the union and shipyard employees that the alleged violations of the 1990 Act violated their rights under the Due Process Clause. The court reasoned that the Act creates no property interest in the plaintiffs. Pet. App. 67a-69a.¹¹

b. Judge Alito dissented, concluding that the 1990 Act precludes judicial review of all statutory claims, procedural as well as substantive. Pet. App. 69a-82a. After examining the structure and history of the 1990 Act, Judge Alito reasoned that judicial review of individual base closures would undermine the Act's objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved in a single package. *Id.* at 74a-82a. He also concluded that the legislative history, which discusses the need to eliminate litigation-related obstacles to base closure, supports preclusion of judicial review. *Id.* at 70a-74a.

3. On June 26, 1992, this Court rendered its decision in *Franklin v. Massachusetts*, 112 S. Ct. 2767, which, *inter alia*, addressed the existence of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act provides that the Secretary of Commerce must submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled under a statutory formula. This Court held that the Secretary's report was not "final agency action" reviewable under the APA (see 5 U.S.C. 704) because it served as "a tentative recommendation" and carried "no direct consequences for the reapportionment." *Id.* at 2774. Although the President's action had sufficient indicia of finality, the Court held that the President is not an "agency"—and that his certification to the

¹¹ The court of appeals also reversed the district court's ruling that this suit should be dismissed under the political question doctrine. Pet. App. 63a-67a. We have not sought review of that holding.

House of Representatives therefore is not "agency action"—for purposes of the APA. *Id.* at 2775.

Because of the similarities between this case and *Franklin*, we petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Franklin*. Pet. App. 83a-84a.

4. a. On May 18, 1993, a divided panel of the court of appeals held on remand that *Franklin* does not affect the reviewability of respondents' procedural claims. Pet. App. 1a-25a. The court reasoned that the Court in *Franklin* "declined only to review the President's decision under the APA" and that it "expressly sanctioned" judicial review of the constitutionality of presidential decisions. Pet. App. 10a. The majority concluded that if, as alleged, the Secretary and the Commission violated the 1990 Act's procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. *Id.* at 10a-12a. The majority further reasoned that if the President acts without constitutional or statutory authority, his actions violate the separation-of-powers doctrine and are therefore unconstitutional. *Ibid.* Accordingly, in the court's view, review of Presidential action for consistency with the "nondiscretionary mandates of [an] authorizing statute" is "a form of constitutional review" permitted under *Franklin*. *Id.* at 10a, 12a.

b. Judge Alito again dissented. Pet. App. 19a-25a. He noted that respondents "vigorously contended * * * that *Franklin* * * * does not bar review under the APA," and did not argue "that they were entitled to non-APA review based on either common law or separation of powers principles." *Id.* at 20a. Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the 1990 Act's procedural requirements. *Id.* at 21a-25a.

SUMMARY OF ARGUMENT

Respondents allege that the Department of Defense and the Base Closure Commission violated certain procedural requirements of the 1990 Act in the course of preparing nonbinding recommendations to close the Philadelphia Naval Shipyard. For two independently sufficient reasons, the court of appeals erred in holding that those claims are subject to judicial review. First, under *Franklin v. Massachusetts, supra*, the actions under challenge do not constitute "final agency action" reviewable under the APA. Second, the 1990 Act itself precludes judicial review of respondents' claims.

I. A. In *Franklin*, this Court held that there is no "final agency action" when an agency prepares a nonbinding recommendation for the President. Where the recommendations have no binding legal effect until they are accepted by the President, the agency's actions are not "final" under the APA. In addition, because the President is not an "agency" for purposes of the APA, his acceptance of the recommendations is unreviewable as well.

Franklin directly controls this case. The 1990 Act, like the census statute at issue in *Franklin*, requires federal agencies to prepare nonbinding recommendations that the President may accept or reject in his discretion. Thus, formulation of base closure recommendations by the Secretary of Defense and the Base Closure Commission is not "final agency action" under *Franklin* because the result of that process will not "directly affect the parties." 112 S. Ct. at 2273. *Franklin* also makes clear that the President's acceptance of the recommendations is not reviewable under the APA.

B. The court of appeals, however, held that *Franklin* does not bar judicial review of respondents' procedural claims because the Court in *Franklin* allowed judicial review of the constitutionality of the President's actions. The court reached that conclusion, moreover, despite the fact that respondents explicitly declined to challenge the

legality of the President's actions on any ground, constitutional or otherwise. And with the exception of a due process claim that the court of appeals had previously rejected on the merits, respondents' claims against petitioners are exclusively statutory claims under the 1990 Act, not constitutional claims.

The court of appeals nevertheless held that respondents' claims are reviewable. It concluded that their procedural claims against the Secretary of Defense and the Commission automatically stated a constitutional claim—namely, that the President acted in excess of his authority by accepting recommendations alleged to be infected with procedural error. But for several reasons, that broad principle, which sharply undermines the APA's limitations on judicial review, cannot be sustained.

1. First, nothing in the 1990 Act states, or even suggests, that the President lacks the authority to accept the Commission's recommendations unless he first determines that the recommendation process was conducted free of procedural error. Rather, as the court of appeals itself acknowledged, "the President * * * may reject the Commission's recommendations for any reason at all," and that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a, 69a.

2. Second, the court of appeals' decision effectively transforms all claims of procedural error into claims of ultra vires conduct. By treating garden-variety claims of procedural error as allegations of ultra vires conduct, the court of appeals' reasoning would displace the carefully crafted review mechanism of the APA in favor of a broad doctrine of "common law" judicial review. That result not only would undo the careful balance struck when Congress enacted the APA's waiver of sovereign immunity in 1976, but also would contravene the notion that procedural errors in the implementation of a statute generally do not disable the government from acting.

3. Third, even if the President's actions had not been authorized by the 1990 Act, it does not follow that the President's acceptance of the recommendations violated

the Constitution. In contrast with the decision below, this Court's decisions have carefully distinguished between claims that an official exceeded his statutory authority and claims that he acted unconstitutionally. And contrary to the court of appeals' reasoning, nothing in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), warrants a different conclusion. *Youngstown* turned on whether the President had inherent constitutional authority to seize the nation's steel mills during wartime, and the President disclaimed any statutory authority for his action. Here, by contrast, the controversy turns exclusively on whether the 1990 Act authorizes the closure of the Philadelphia Naval Shipyard. In addition, the plaintiffs in *Youngstown* independently alleged that the President's action invaded their constitutionally protected property rights. Hence, there is no basis for reading *Youngstown* as establishing the principle that a claim of ultra vires action automatically states a judicially cognizable claim for relief under the Constitution.

II. Even if judicial review were not barred under *Franklin*, it would nevertheless be unavailable because the 1990 Act itself precludes judicial review. Judicial review of the base closure process is fundamentally antithetical to the structure, history, and purposes of the 1990 Act.

A. The court of appeals erred in holding that the actions at issue in this case are subject to the APA's presumption of reviewability. The base closure process inherently involves sensitive questions of military policy. And this Court has held that the presumption of reviewability does not apply to decisions of that nature.

B. Even if the presumption of reviewability did apply here, the structure, history, and purposes of the 1990 Act overcome that presumption and preclude judicial review. To carry out the militarily and politically sensitive task of closing domestic military bases, the 1990 Act strikes a careful balance between the Executive Branch and Congress. It makes the President personally responsible for the base closure decision, and provides for extensive congressional involvement and oversight in the process. To

limit the potential for political considerations to enter the process, the Act creates a neutral body, the Base Closure Commission, which is charged with preparing a single package of recommendations. The President must approve or disapprove the entire package, and Congress may invoke expedited procedures for passing a joint resolution of disapproval for the package as a whole. In addition, to avoid the delay and obstruction that characterized the base closure process in the past, the 1990 Act also emphasizes expedition and finality by creating a highly expedited decisionmaking process free from procedural obstacles.

Judicial review of respondents' claims cannot be reconciled with those features of the 1990 Act. If individuals were able to sue whenever they fail to achieve their objectives through the congressional oversight process established by the Act, that result would not only disrupt the careful balance struck between the political Branches, but also intrude on Congress's statutory oversight role. Judicial review would defeat the statutory goal of producing a single, indivisible package of base closures for consideration by the President and Congress. And it would make the Act's objectives of expedition and finality impossible to achieve.

C. The fact that respondents are advancing procedural claims does not make judicial review of those claims any less inconsistent with the structure and policies of the Act. Procedural litigation (primarily under NEPA) was among the primary sources of obstruction and delay in the base closure process prior to the enactment of the 1990 Act and its immediate predecessor, the 1988 Act. Accordingly, there is no basis for concluding that Congress's intent to preclude judicial review stops short of review for procedural errors.

ARGUMENT

I. *FRANKLIN v. MASSACHUSETTS* FORECLOSES JUDICIAL REVIEW

A. The Secretary's And The Commission's Base Closure Recommendations Are Not "Final Agency Action," And The President's Approval Of Those Recommendations Is Not Subject To The APA

The court of appeals' decision in this case squarely conflicts with the principles of judicial review set forth by this Court in *Franklin v. Massachusetts*, *supra*. Under the statute at issue in *Franklin*, the Secretary of Commerce prepared a report to the President containing each State's population according to the 1990 census, and the President, in turn, certified to Congress the number of United States Representatives to which each State was entitled under a statutory formula. 112 S. Ct. at 2771. The plaintiffs claimed, *inter alia*, that the Secretary's method of allocating overseas military service members among state populations was arbitrary and capricious under the APA.

This Court held that there was no "final agency action" reviewable under the APA. 112 S. Ct. at 2773. The Court explained that the "core question" regarding finality is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Ibid*. Because the Secretary's report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774. By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. *Id.* at 2775. The Court held, however, that the President is not an "agency" for purposes of the APA. "Out of respect for the separation of powers and the unique constitutional position of the President," the Court

concluded that the APA's "textual silence" concerning its coverage of the President was insufficient "to subject the President to [its] provisions." *Ibid.*

A straightforward application of *Franklin* makes clear that there likewise is no "final agency action" in this case. As relevant here, respondents challenge the procedures used by the Secretary of the Navy, Secretary of Defense, and the Commission to prepare their base closure recommendations. Like the Secretary's report in *Franklin*, the base closure report of the Commission is only tentative and has "no direct effect" (*Franklin*, 112 S. Ct. at 2774) until after the President certifies his approval of the report to Congress. See § 2904(a) and (b); pp. 5-6, *supra*. The actions of the Secretary of the Navy and the Secretary of Defense, which precede those of the Commission in the decision-making process, are still more "tentative." *Franklin*, 112 S. Ct. at 2774. Because the challenged actions of petitioners are merely nonbinding and preliminary to the President's final decision, they do not, under *Franklin*, constitute "final agency action" that is subject to judicial review under the APA. See *Cohen v. Rice*, 992 F.2d 376, 381-382 (1st Cir. 1993) (holding that *Franklin* forecloses judicial review of challenges to the preparation of recommendations under the 1990 Act); see also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (administrative actions "are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process"). And because the President is not an "agency," his action in approving the Commission's recommendations and certifying that approval to Congress is not subject to judicial review under the APA. *Franklin*, 112 S. Ct. at 2775-2776.

B. *Franklin's* Exception For Constitutional Challenges To Presidential Action Is Inapplicable

1. Although the Court vacated the court of appeals' initial decision in this case and remanded for further consideration in light of *Franklin* (see 113 S. Ct. 455; Pet. App. 83a-84a), the court of appeals on remand found respondents' procedural claims reviewable. The court of appeals acknowledged that under *Franklin*, respondents' claims are not reviewable under the APA. But the court found respondents' claims reviewable based on "common law" principles of judicial review outside the carefully limited provisions of the APA. See Pet. App. 8a. The court focused on *Franklin's* observation that "the President's actions may * * * be reviewed for constitutionality," even though they are not subject to the APA. 112 S. Ct. at 2776. The court of appeals reasoned that if (as respondents allege) petitioners committed procedural violations of the 1990 Act in preparing base closure recommendations, the President exceeded his authority—and thereby violated the Constitution—by approving those recommendations and certifying his approval to Congress. Pet. App. 11a-13a.

That reasoning necessarily rests on the premise that respondents' claims of statutory error by the Secretary and the Commission inherently state a claim of constitutional violation by the President. Respondents have never alleged that the President violated any provision of law, much less the Constitution.¹² Rather, their complaint is

¹² Aside from reciting the bare fact that the President approved the Commission's recommendations (J.A. 45), the complaint makes no reference to the President's actions. Nowhere does the complaint allege that the President committed any unconstitutional, or otherwise unlawful, act or omission. And respondents later went out of their way to make clear that they were not challenging the legality of the President's actions. Respondents emphasized to the court of appeals that "it is the conduct of [the] defendants—not

directed entirely at the alleged acts and omissions of the Navy, the Secretary of Defense, and the Commission prior to forwarding recommendations to the President. See notes 8-9, *supra*. Even as to those actions, moreover, respondents' only constitutional claim (under the Due Process Clause) was dismissed at an earlier stage in the proceedings and is no longer at issue in this case. See Pet. App. 67a-69a; note 7, *supra*. Thus, the clear import of the court of appeals' decision is that if petitioners violated the 1990 Act's procedural requirements in formulating their recommendations, the President necessarily violated the Constitution by accepting those recommendations.

The court of appeals' ruling effectively does away with *Franklin's* restrictions on judicial review of Presidential action. The principal claims found subject to review are (1) that the Secretary of Defense did not provide the Commission and the GAO with all the information used in making his recommendations, and (2) that the Commission held some nonpublic hearings. Pet. App. 60a, 62a & n.15. If those routine claims of statutory error by subordinate officials trigger "common law" (*id.* at 8a) judicial review of the President's formal approval of base closures, then *Franklin's* exception for constitutional claims will swallow the rule that the President's actions are unreviewable.

That result is sharply at odds with *Franklin's* concern for "the separation of powers and the unique constitutional position of the President." *Franklin*, 112 S. Ct. at 2775. By vesting the ultimate decision on base closures in the President (subject to legislative disapproval), Congress assigned responsibility for final action to a dis-

that of the President—that [they] challenge." Resp. C.A. Remand Br. 12 (emphasis added). Respondents also explained that they "do not seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." *Id.* at 8.

tinctly accountable officer. "The President's unique status under the Constitution distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). He is entrusted under the Constitution "with supervisory powers of utmost discretion and sensitivity," including the responsibility to "'take Care that the Laws be faithfully executed.'" *Ibid.* (quoting U.S. Const. Art. II, § 3). Accordingly, this Court has been reluctant, in a variety of contexts, to hold that the President's actions are subject to judicial review. See, e.g., *Franklin*, 112 S. Ct. at 2775-2776 (no review of presidential decisions under the APA); *Nixon v. Fitzgerald*, *supra* (President absolutely immune from private damage suits for actions taken within the outer perimeter of his official duties); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) (federal courts in general have "no jurisdiction * * * to enjoin the President in the performance of his official duties").

In light of the separation of powers considerations underlying *Franklin* and similar decisions of this Court (see *Nixon v. Fitzgerald*, 457 U.S. at 747-753; *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)), the President's direct exercise of authority should not lightly be subjected to broad judicial review on theories of "common law" reviewability. That is particularly so where, as here, the claims relate to alleged errors in the way his subordinates arrived at their tentative, nonbinding recommendations under a scheme that gives the President unfettered authority to accept or reject the recommendations in question.¹³ See pp. 26-28, *infra*.

¹³ The court of appeals erred in relying (Pet. App. 12a) on the proposition that *Franklin* involved only a claim of arbitrary and capricious action under the APA. The plaintiffs in that case also challenged the counting of overseas servicemembers on the ground that it violated the Census Act. See *Commonwealth v. Mosbacher*, 785 F. Supp. 230, 266 n.31 (D. Mass. 1992); *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment in part); No. 91-1502 Appellees Br. 74-76. Although the

This conclusion is strongly reinforced, moreover, by the fact that the broad "common law" action recognized by the court of appeals would effectively upset the legislative accommodation that resulted in Congress's waiver of sovereign immunity under the APA in 1976. See Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721, codified at 5 U.S.C. 702.¹⁴ The type of action recognized by the court of appeals is a so-called "officer's suit"—i.e., a nonstatutory challenge premised on the notion that an officer has acted in excess of his statutory authority. Before Congress amended the APA in 1976, such actions were a common basis for obtaining specific relief against federal officers in the absence of a waiver of sovereign immunity. See, e.g., *Dugan v. Rank*, 372 U.S. 609, 621 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949). The theory of such suits was that when an "officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his acts "are *ultra vires* his authority and * * * may be made the object of specific relief." *Ibid.*

majority in *Franklin* did not specifically refer to that claim, its holding that the appellees had no right of judicial review to raise their statutory claims under the APA would apply equally to their challenge under the Census Act. Both types of challenges are provided for under the APA, 5 U.S.C. 706(2) (allowing court to set aside agency actions that are "arbitrary and capricious," "an abuse of discretion," or "in excess of statutory * * * authority"), and the lack of "final agency action" precludes review of both.

¹⁴ The waiver of sovereign immunity added to 5 U.S.C. 702 in 1976 provides: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

As this Court has recognized, the doctrine of *ultra vires* conduct was applied confusingly and inconsistently. *International Primate Protection League v. Administrators of Tulane Education Fund*, 111 S. Ct. 1700, 1708 (1991); *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962); see also H.R. Rep. No. 1656, 94th Cong., 2d Sess. 3-11 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3-9 (1976). In 1976, Congress enacted a waiver of sovereign immunity under the APA, in large measure, to rectify that confusion and to rationalize the law of judicial review of agency action. See H.R. Rep. No. 1656, *supra*, at 9-11; S. Rep. No. 996, *supra*, at 7-9. In eliminating the doctrine of sovereign immunity, however, Congress emphasized that other APA doctrines—governing the "availability, timing, and scope of judicial review"—would continue to be available to "control[] unnecessary judicial intervention in administrative decisions." H.R. Rep. No. 1656, *supra*, at 9; S. Rep. No. 996, *supra*, at 9.

The court of appeals' ruling in this case upsets the balance Congress struck in 5 U.S.C. 702. First, by holding that judicial review is available outside the confines of the APA on the theory of *ultra vires* Presidential action, the court threatens to introduce into the law the very brand of confusion that Congress amended the APA to eliminate in 1976. Second, by holding that judicial review is available without regard to the existence of "final agency action," the court disregarded Congress's understanding that official action is broadly reviewable, but only within the framework and limitations of the APA. This Court should not embrace the fiction that allows broad "common law" judicial review to determine whether executive officials acted in excess of their authority under the 1990 Act—even though their actions are not reviewable under the APA. See *Block v. North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 280-286 (1983) (Congress waived sovereign immunity in suits involving federal land under Quiet Title Act; enactment of that carefully crafted statutory scheme precludes

resort to common law "officer's suits").¹⁵ Particularly because the APA broadly provides for review of claims that an agency acted "in excess of statutory * * * authority" (5 U.S.C. 706(2)(C)), the effect of the lower courts' ruling is to allow review authorized by Congress under the APA, but without observance of the limitations imposed by Congress in the APA.

2. Even if an "officer's suit" of the type recognized by the court of appeals were available under current law, the President did not act *ultra vires* his authority in this case. The court of appeals believed that because the Act's procedural provisions are "nondiscretionary" (Pet. App. 12a), the alleged procedural errors of the Secretary and the Commission necessarily divested the President of authority to approve the Commission's recommendations. The effect of that reasoning, however, is to obliterate the distinction between routine statutory claims, like those at issue here (see p. 20, *supra*), and genuine claims of *ultra vires* action.

a. The proper distinction between simple error and *ultra vires* conduct is best illustrated by this Court's sovereign immunity cases. In those cases, this Court has distinguished between claims that an officer acted "*ultra vires* his authority," which are the proper subject of spe-

¹⁵ The legislative history accompanying the 1976 waiver of sovereign immunity under the APA explicitly referred to enactment of the Quiet Title Act four years earlier as an illustration of why sovereign immunity should be waived generally. See H.R. Rep. No. 1656, *supra*, at 9 ("Just as there is little reason why the United States as a landowner should be treated differently from other landowners in an action to quiet title, so too has the time now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer in an official capacity."); S. Rep. No. 996, *supra*, at 8 (same). Thus, the Court's treatment in *Block* of the waiver of sovereign immunity under the Quiet Title Act, and its relevance to the continued availability of "officer's suits," are directly pertinent here with respect to respondents' efforts to circumvent the APA.

cific relief, and mere "claim[s] of error in the exercise of that power,"¹⁶ which are barred by sovereign immunity. *Larson*, 337 U.S. at 689-690. As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all."¹⁷ *Id.* at 691 n.12;

¹⁶ For an illustration of a case involving mere error, see *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218 (1913), upon which the Court relied heavily in *Larson*, 337 U.S. at 700-702. In *Goldberg*, the Secretary of the Navy awarded a contract for the sale of a surplus vessel to someone other than the high bidder. The high bidder then filed suit to compel the Secretary to deliver the vessel to him. Although the lower courts considered whether the sale was consummated when the Secretary opened the high bid, this Court refused to address the merits of that issue. As the Court explained in *Larson*, "[w]rongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." *Larson*, 337 U.S. at 700-701.

¹⁷ In that respect, the analysis of *ultra vires* executive conduct is properly analogized to the question whether a federal court has subject matter jurisdiction. Just as an executive official is authorized to act only if he has constitutional or statutory authority (see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)), a federal court must have statutory or constitutional authority before it may exercise jurisdiction over a case. See, e.g., *Finley v. United States*, 490 U.S. 545, 547-548 (1989). This Court has accordingly equated the existence of subject matter jurisdiction with a federal court's "power to act" at all. *McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975). In contrast, the Court has emphasized that "[a]ny error in granting or designing relief 'does not go to the jurisdiction of the court.'" *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 561 (1968) (quoting *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928)). Thus, it is significant that this Court has never treated a federal court's violation of a nondiscretionary procedural rule as a matter that divests the court of jurisdiction to enter a judgment. Cf. *United States v. Olano*, 113 S. Ct. 1770, 1776 (1993) (litigants in criminal and civil cases may waive their procedural rights in federal court).

see *Noble v. Union River Logging R.R.*, 147 U.S. 165, 174 (1893).

Although application of the distinction is not always straight-forward (see, e.g., *Primate Protection League*, 111 S. Ct. at 1708), a finding of ultra vires executive action at a minimum requires a "depart[ure] from a plain official duty" (*Payne v. Central Pac. Ry.*, 255 U.S. 228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 110-111 n.20 (1984) (collecting cases); *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876) (specific relief against violation of "plain official duty, requiring no exercise of discretion"). In other words, "a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake." *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 98 (1845); see also *Wells v. Roper*, 246 U.S. 335, 338 (1918).

Under the foregoing principles, the court of appeals in this case erred in holding that respondents' procedural allegations against the Secretary of Defense and the Commission state claims of ultra vires action by the President. Contrary to the majority's reasoning (Pet. App. 12a), nothing in the 1990 Act denies the President authority to approve the Commission's recommendations unless he first determines that they were formulated free of procedural error. The President's powers and responsibilities are set forth in Section 2903(e) of the 1990 Act. Under the terms of that provision, the President "shall, by no later than July 15 * * *, transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations." § 2903(e)(1). If the President disapproves the Commission's recommendations in whole or in part, he "shall transmit to the Commission and the Congress the

reasons for that disapproval." § 2903(e)(3). In that event, the Commission must submit a revised list of recommendations by August 15, and if the President approves the revised recommendations, he "shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval." § 2903(e)(4)-(5).

Nowhere in those provisions has Congress imposed, or even suggested, any condition or limitation on the President's unqualified authority to "approv[e] or disapprov[e]" the Commission's recommendations.¹⁸ Rather, the only obligation imposed on the President by the 1990 Act is to decide, in his discretion, to approve or disapprove those recommendations and give notice of his decision to the Commission and Congress within the time allowed. § 2903(e)(1)-(4). As Judge Alito explained in his dissent below:

Nothing in these provisions suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the

¹⁸ Respondents themselves conceded below that "[i]t is not the President's duty to review the procedural integrity of the base closure process or analyze whether [petitioners] complied with the Act's procedural mandates." Resp. C.A. Remand Br. 2.

Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the affected base was tainted by prior procedural irregularities.

Pet. App. 23a-24a.¹⁹

Indeed, the court of appeals acknowledged in its initial decision that "the President and Congress * * * may reject the Commission's recommendations for any reason at all," and that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a, 69a. That conclusion cannot be squared with the court's subsequent determination that the President acts wholly beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims that the Secretary or the Commission erred, the President was under no "plain official duty" (*Payne*, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error, and he was not disabled from "mak[ing] a decision at all" (*Larson*, 337 U.S. at 691 n.12) in the circumstances presented here. Rather, because the President's authority to accept or reject the Commission's recommendations "had no limitation placed upon it by the Congress" (*Dugan*, 372 U.S. at 622), he did not act beyond his statutory powers by accepting the Commission's recommendations in this case, whether or not the Commission or Secretary might have committed procedural error along the way.

¹⁹ Of course, even though the President is not required to review the procedural integrity of petitioners' actions, he is not foreclosed from doing so in the exercise of his broad discretion under the 1990 Act. The President may approve or disapprove the Commission's recommendations on any ground, including procedural grounds such as those advanced by respondents.

b. That conclusion is reinforced by this Court's precedents holding that an agency's failure to comply with mandatory statutory procedures does not in itself disable the agency from acting unless Congress has expressly so provided. As this Court has explained, "[t]here is no presumption or general rule that for every duty imposed upon * * * the Government * * * there must exist some corollary punitive sanction for departures or omissions." *United States v. Montalvo-Murillo*, 495 U.S. 711, 717 (1990) (government may seek pretrial detention despite failure to comply with statutory "first appearance" requirement). Rather, "[m]any statutory requisitions intended for the guide of officers in the conduct of business devolved upon them * * * do not limit their power or render its exercise in disregard of the requisitions ineffectual." *Id.* at 718 (quoting *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)). This Court has accordingly been "reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (agency not disabled from proceeding because of failure to meet 120-day limitation on action to recover misused federal funds); see also *United States v. Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886) (noting "great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided").

Thus, where a statute cannot "be read to require, or even suggest," that a procedural error disables the government from acting, no such consequence should be implied. *Montalvo-Murillo*, 495 U.S. at 717; see *id.* at 717-719. Furthermore, this Court has made clear that Congress's use of mandatory language in imposing a procedural requirement does not lead to the conclusion that the requirement limits the agency's "power to act." *Brock*, 476 U.S. at 262. In this case, it is significant that the 1990 Act contains no suggestion either that the proce-

dural requirements imposed on the Secretary and the Commission bind the President or that the President's discretion to accept or reject the Commission's recommendations is limited in any way. Given the President's personal responsibility for accepting or rejecting base closure recommendations and Congress's streamlined procedures for considering whether to disapprove them, it is implausible to suppose that Congress meant to bring the base closure process to a halt if a subordinate official committed a procedural error in preparing recommendations for those who are uniquely responsible—and politically accountable—for the ultimate base closure decisions.

3. Even if the President acted beyond his statutory authority in approving the Commission's recommendations, the court of appeals erred in further concluding (Pet. App. 11a-12a) that the respondents stated a claim for relief under the Constitution.

In finding that respondents stated a constitutional claim, the court of appeals reasoned that under *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, the President must have constitutional or statutory authority for whatever action he takes. Pet. App. 11a. The court then concluded that because the President has no inherent authority to close military bases, if he acted without statutory authority, he violated the Constitution. *Id.* at 12a ("our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review").

Contrary to the court of appeals' reasoning, however, no decision of this Court suggests that an Executive Branch officer who acts in excess of his statutory authority automatically thereby violates the Constitution. Rather, this Court has explicitly distinguished between "actions contrary to [a] constitutional prohibition" and actions "merely said to be in excess of the authority delegated * * * by the Congress." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396-397 (1971); see also *Wheeldin v. Wheeler*, 373 U.S. 647, 650-652 (1963) (absent a Fourth Amendment

violation, no federal cause of action exists for abuse of delegated subpoena power). Furthermore, this Court's cases involving "officer's suits" expressly contemplate that immunity may be stripped from an official's actions if the officer being sued has acted either "unconstitutionally or beyond his statutory powers." *Larson*, 337 U.S. at 691 n.11 (emphasis added); accord, *e.g.*, *Dugan*, 372 U.S. at 621-622; *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912). There would have been no reason for the Court to specify unconstitutionality and ultra vires conduct as separate categories in those cases if, as the court of appeals apparently believed (Pet. App. 11a), all conduct in excess of statutory powers were unconstitutional for that reason alone.

In pre-1976 cases such as *Larson*, the question of ultra vires conduct arose in the specific context of deciding whether sovereign immunity shielded the conduct at issue from challenge; it did not go to the distinct question, presented here, whether the plaintiff stated a claim for relief, much less a claim for relief under the Constitution. See *Larson*, 337 U.S. at 693 (distinguishing issue of "invasion of legal rights" from question whether conduct complained of is "sovereign or individual"); Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. 81 (1941) ("The plaintiff cannot sue to redress merely any unauthorized action by an officer. To maintain the suit the plaintiff must allege conduct by the officer which, if not justified by his official authority, is a private wrong to the plaintiff."). To be sure, in some instances the availability of a common law cause of action has turned on whether the government was authorized to undertake particular action. See, *e.g.*, *Dugan*, 372 U.S. at 622-623.²⁰ Even in those cases, how-

²⁰ In *Dugan*, for example, the Court held that the government's authority to seize the plaintiffs' water rights eliminated any claim that the action was a trespass. 372 U.S. at 622-623. Because the government's invasion of their rights was authorized, the plaintiffs

ever, the presence or absence of ultra vires conduct was relevant only to whether an existing cause of action could be invoked; we are unaware of any case in which this Court held that a lack of authority was the source of the private right in question.

The court of appeals' contrary conclusion—that an allegation of ultra vires conduct inherently states a cause of action under the Constitution (Pet. App. 11a-12a)—rests largely on a misreading of *Youngstown*. That case involved the President's authority to seize private domestic steel mills during the Korean War. See 343 U.S. at 582-583. The mill owners sued to enjoin the seizure, arguing that Congress, and not the President, had the authority to seize the mills. This Court agreed, holding that the Executive had usurped congressional authority. *Id.* at 588.

Youngstown differs from this case in two crucial respects, each of which undermines the court of appeals' broad reliance on that case. First, the government in *Youngstown* disclaimed any statutory basis for the President's actions. See 343 U.S. at 585-586. Although two statutes authorized the seizure of private property under specified conditions, it was conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that the pertinent statutory authority was "too cumbersome, involved, and time-consuming." *Id.* at 586. Instead, the government defended the seizures exclusively on the ground that they were authorized by Article II of the Constitution. 343 U.S. at 587-588. As a result, the sole issue presented to the courts was the constitutional question whether "the seizure order [was] within the constitutional power of the President." *Id.* at 584.²¹

did not have a claim for trespass, but were limited to an action in the Court of Claims for a taking of property without just compensation. *Id.* at 623.

²¹ A similar constitutional challenge was presented in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the other case cited by

Here, by contrast, the underlying legal controversy involves purely a statutory question. Respondents claim that petitioners did not comply with the 1990 Act. Petitioners argue that they did. Neither the President nor petitioners have relied on inherent Article II powers in selecting the Philadelphia Naval Shipyard for closure. Thus, even if respondents' allegations had focused on the President's acceptance of the base closure recommendations, resolution of the dispute in this case would not require a judgment about the constitutional authority of the President. In short, to characterize this statutory controversy as a separation-of-powers dispute, as in *Youngstown*, is to disregard the essence of the claims and defenses in this case.

Second, the seizure of the steel mills in *Youngstown* invaded the property rights of the mill owners—personal rights that were protected not only by the common law, but also by the Fifth Amendment. By contrast, closure of the Philadelphia Naval Shipyard does not deprive respondents of any such rights. In its initial decision, the court of appeals held (and respondents have not contested) that the respondent unions and employees—the plaintiffs with the most concrete stake in this litigation—lack any property interest in the Shipyard's continued operation. See Pet. App. 69a (respondents "can identify

this Court in *Franklin* for the proposition that presidential conduct may be reviewed for constitutionality. In *Panama Refining*, Congress vested the President with authority to ban interstate transportation of oil produced in violation of state production and marketing limits. This Court invalidated the statute as an unconstitutional delegation of Congress's Article I powers. In *Panama Refining*, as in *Youngstown*, the dispute did not involve the scope of the President's statutory authority; rather, the challenge turned solely on the Constitution. In addition, the plaintiffs' complaint in *Panama Refining* alleged that their property rights were being invaded by state and federal officials, and that the statutes in question violated the Fourth and Fifth Amendments and the non-delegation doctrine. Amended Bill of Complaint 1-9, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (No. 135).

no legitimate claim of entitlement").²² Thus, unlike the typical case involving the issue of ultra vires conduct, there is no independent common law or constitutional right to be vindicated by respondents' claims. Compare, e.g., *Philadelphia Co. v. Stimson*, 223 U.S. at 632 (land title and riparian rights under state law); *Larson*, 337 U.S. at 693 (tort claim); *Dugan*, 372 U.S. at 622 (trespass claim); *Youngstown*, *supra* (unauthorized taking and trespass); see also *Franklin*, 112 S. Ct. at 2776-2777 (justiciable claim of malapportionment under Article I, § 2, Cl. 3).

In short, *Youngstown* provides no support for the court of appeals' decision because this case lacks both the constitutional dimensions and the protected private interests that supported the exercise of judicial power in *Youngstown*. Respondents have, in fact, brought a straightforward action for APA review of the actions of subordinate federal officials in preparing nonbinding recommendations for the President. Because *Franklin* instructs that those actions are not "final agency action[s]" for purposes of the APA, those claims are not subject to judicial review under the APA. The court of appeals erred in circumventing the holding of *Franklin* by treating respondents' routine claims of procedural error under the 1990 Act as claims of constitutional deprivation.

²² The court of appeals in this case correctly held that respondents' due process claim failed for want of a cognizable property interest. The 1990 Act vests no property rights in respondents, because it vests absolute discretion in the President. Cf. *Meachum v. Fano*, 427 U.S. 215, 226-229 (1976) (discretionary decision by state prison officials to transfer prisoner implicated no liberty interest, despite loss of employment); *Bishop v. Wood*, 426 U.S. 341, 344-347 (1976) (no property interest in "at will" employment); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). Absent such a property interest, plaintiffs cannot assert a due process claim.

II. THE STRUCTURE, HISTORY, AND PURPOSES OF THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT IN ANY EVENT ESTABLISH THAT THE ACT PRECLUDES JUDICIAL REVIEW

If the Court concludes, contrary to our submission in Point I, that review is not foreclosed by *Franklin v. Massachusetts*, this case must still be dismissed because the 1990 Act "preclude[s] judicial review" of respondents' claims within the meaning of the APA, 5 U.S.C. 701(a)(2). Although the court of appeals held that the 1990 Act impliedly precludes judicial review of respondents' substantive challenges to decisions made during the base selection process (Pet. App. 55a-60a, 61a-62a),²³ it also held that the Act does not preclude courts from reviewing claims that the Department of Defense and the Commission failed to comply with the Act's procedural requirements. *Id.* at 60a, 61a-62a. The former ruling is, in our view, correct, and it has not been challenged by respondents in this Court. The latter ruling, however, is wrong.

²³ In particular, the court of appeals found that Congress did not intend to permit judicial review of claims that (1) the Secretary's force structure plan lacked sufficient detail; (2) the force structure plan was based upon insufficient data; (3) the Secretary impermissibly prejudged the question whether the Philadelphia Naval Shipyard should be closed; and (4) the Secretary of Defense relied on insufficiently explained and inadequately documented advice from the Secretary of the Navy. Pet. App. 56a. The court reasoned that Congress committed those matters to the Secretary's discretion, that the decisions required military and other types of expertise, and that Congress provided alternative avenues of review through the Commission and the GAO. *Id.* at 56a-58a. The court also found that the 1990 Act precludes review of respondents' claims that the Commission (1) failed to consider all Navy installations equally; (2) accepted inadequately documented recommendations; (3) utilized unpublished criteria; and (4) failed to apply published criteria equally. *Id.* at 61a. In the court's view, those issues are not amenable to review under judicially manageable standards, and the 1990 Act provides alternative means of review of the Commission's decisionmaking—specifically, oversight by the President and Congress. *Id.* at 62a.

The 1990 Act embodies an intricate compromise that carefully accommodates the interests of the Executive Branch and Congress in order to achieve consensus on the politically sensitive issue of closing domestic military bases in a politically neutral and expeditious manner. To achieve that end, the Act assigns the President a direct and personal role in the base closure process and involves Congress in overseeing the Executive Branch's decisionmaking process. The Act also requires that bases be proposed for closure by a nonpartisan Commission whose recommendations must be accepted or rejected as a single, indivisible package. Finally, to accomplish Congress's goals of expedition and finality, the 1990 Act eliminates procedural obstacles that effectively blocked the closure of bases prior to 1988.

Judicial intervention at the behest of persons affected by individual base closures strikes at the heart of this carefully developed statutory scheme. It invites federal courts to overturn the result embraced by the political Branches through the statutory process. It threatens to disrupt the balance struck by the Act, and in so doing, to displace the President and Congress as the final arbiters of the base closure process. And it subjects the President's decision to the very kinds of procedural litigation and delays that the 1990 Act was designed to eliminate.

A. The Court Of Appeals Erred In Applying The Presumption Of Reviewability

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. Pet. App. 45a-46a. Reliance on that presumption is misplaced in the context of the 1990 Act, which addresses sensitive questions of national security and military policy. See *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (presumption of reviewability "runs aground when it encounters concerns of national security"); see also e.g., *Chappell v. Wallace*, 462 U.S. 296 (1983) (no *Bivens* remedy available for service-related military injuries); *Orloff v. Willoughby*, 345 U.S.

83, 92-94 (1953) (no habeas corpus review of duty assignment); *Feres v. United States*, 340 U.S. 135 (1950) (Federal Tort Claims Act inapplicable to service-related torts). "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citing cases).²⁴

As the court of appeals itself acknowledged, the 1990 Act calls for exercise of "the discretion of the Commander-in-Chief concerning the domestic deployment of the [N]ation's military resources." Pet. App. 46a. The court further recognized that the task of formulating and applying base closure standards by the Secretary and Commission require military judgment and expertise. *Id.* at 56a-59a; see also *National Federation of Federal Employees v. United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) (base closure process under 1988 Act). Because the base closure process therefore necessarily involves sensitive judgments of military policy (see, e.g., § 2903(a), (c)(1) and (d)(2)), the court of appeals erred in applying the presumption, developed in different circumstances, that Congress intends judicial review of the outcome of an administrative process.²⁵

²⁴ If the President certifies that closure of a military base "must be implemented for reasons of national security or a military emergency," he may proceed without regard to the requirements of the Base Closure Act, § 2909(c)(2); see 10 U.S.C. 2687(c). Nonetheless, a package of base closure decisions governed by the Act involves a delicate weighing of considerations of overall military strategy and national defense even when "national security or a military emergency," strictly speaking, does not demand a particular closure.

²⁵ Although the court of appeals purported to limit judicial review to alleged violations of statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. The Act permits the President to approve or disapprove the Commission's recommendations for any reason at all. Pet. App. 46a, 69a. The court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his

B. The Structure, History, And Purposes Of The 1990 Act Demonstrate That Congress Intended To Preclude Judicial Review Of Respondents' Procedural Claims

Even if the presumption of reviewability were applicable here, this Court has emphasized that "[t]he presumption favoring judicial review of administrative action is just that—a presumption." *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). It is "overcome * * * whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351. The pertinent congressional intent may be found in various sources. The presumption in favor of judicial review "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349. Congressional intent "may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." *Ibid.* (citations omitted). Finally, the presumption of reviewability "may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Ibid.* When measured against these standards, the Act precludes judicial review of the base closure process.

1. Judicial review is incompatible with the structure of the 1990 Act. Like its immediate predecessor—the 1988 Act (see pp. 3-4, *supra*)—the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990). To achieve that objective, a process was fashioned that would address the tendency of "political pressures * * * to interfere" with the integrity of the process. H.R. Rep. No. 735, *supra*, Pt. 2, at 8-9; see H.R. Conf. Rep. No. 923, *supra*, at 705; 1991 Report at 1-1 to 1-2; Pet. App. 77a-79a (Alito, J., dissenting in part).

subordinates have not observed every procedural particular thought to be required under the 1990 Act.

Accordingly, the 1990 Act is structured to limit the avenues through which political maneuvering can delay or derail the base closure process. By requiring the President to approve the base closure recommendations (§ 2903(e)), Congress provided that the ultimate decision maker in the Executive Branch would be an official directly accountable to the people. At the same time, Congress also called for extensive congressional involvement throughout the process. For example, the Act provides for presidential consultation with key Members of Congress before the President appoints the Commissioners. § 2902(c)(2). The Act also requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the preparation of base closure recommendations for the President. See, e.g., § 2903(a)(1), (b)(2), (c)(1) and (d)(3).²⁶ Finally, the process facilitates substantial congressional oversight by adopting streamlined legislative procedures that eliminate the usual opportunities for delay and strategic maneuvering. §§ 2904(b), 2908.²⁷

²⁶ The Secretary of Defense must submit the force-structure plan to Congress along with the budget justification documents submitted each year. § 2903(a)(1). In addition, the Secretary was required to transmit to the congressional defense committees the final criteria for base closure selection prepared in 1991. § 2903(b)(2). When the Secretary of Defense publishes his recommended closures in the *Federal Register*, he must also transmit the list of recommendations to those congressional committees. § 2903(c)(1). If the Commission departs from the Secretary's recommendations, it must prepare a report explaining and justifying the departure, and it must transmit that report simultaneously to Congress and the President. § 2903(d)(3).

²⁷ A Member of Congress may introduce a joint resolution of disapproval within ten days of the President's transmittal of the Commission's report with his approval. § 2908(a). That resolution covers all of the recommendations (*ibid.*), and it is referred to the Armed Services Committee of the appropriate House. § 2908(b). If the Committee does not report on the resolution within 20 days of the President's transmittal, the resolution is automatically dis-

A critical feature of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, *supra*, at 341. To safeguard the Commission's role, its recommendations must be considered as an indivisible package (H.R. Conf. Rep. No. 923, *supra*, at 704), and the President may trigger base closures under the Act only by approving "all the recommendations" of the independent Commission. See § 2903(e)(2) and (4).²⁸ The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approves for closure, and no amendments to the joint resolution may be entertained. § 2908(a)(2) and (d)(2).

The scheme of the 1990 Act thus reflects a purpose to transform the base closure process into one whose safeguards are provided by the direct, and carefully balanced, participation of the President and Congress. By allowing litigants to contest individual base closures after the President has approved, and Congress has declined to disapprove, an entire package of base closures, the court of appeals has struck at the heart of that mechanism. Under the court's decision, private parties—whose elected representatives failed to achieve their goals through the Act's streamlined legislative procedures²⁹—will be able to pick

charged and placed on the legislative calendar. § 2908(c). Three days later, a Member may make a nondebatable motion to proceed to consideration of the resolution. § 2908(d)(1). When the resolution is considered, debate is limited to two hours. § 2908(d)(2).

²⁸ The President, of course, is free to disapprove the Commission's recommendations in whole or in part. § 2903(e)(3). If he does so, the Commission produces a new set of recommendations. *Ibid.* At that point, if the President does not approve "all of the revised recommendations," no base closures may be effectuated under the Act for that round. § 2903(e)(4) and (5).

²⁹ As discussed (see pp. 7-8, *supra*), on July 30, 1991, the House of Representatives considered a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the debate on

apart the end product of the process. If litigants can sue to extract an individual base (like the Philadelphia Naval Shipyard), from the package of closures and require the Commission to redo its recommendation for that base, "the President and the Congress would then be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base." Pet. App. 82a (Alito, J., dissenting in part).³⁰

2. a. Judicial review also is precluded where it is inconsistent with Congress's goals of expedition and finality. See, e.g., *Morris v. Gressette*, 432 U.S. 491, 501-505 (1977). Based on its recognition that "[e]xpedited procedures * * * are essential to make the base closure process work" (H.R. Rep. No. 665, *supra*, at 384), Congress crafted a process that "would considerably enhance the ability of the Department of Defense * * * promptly [to] implement proposals for base closures and realignment." H.R. Conf. Rep. No. 923, *supra*, at 707. Con-

that resolution, several of the respondent Members of Congress argued that the resolution of disapproval should be passed because of alleged flaws in the procedures used to select the Philadelphia Naval Shipyard for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The explicit provision for substantial congressional oversight in the base closure process is strong evidence that Congress did not intend to rely on the courts to police that process. Cf. *Banzhaf v. Smith*, 737 F.2d 1167, 1169 (D.C. Cir. 1984) (en banc) ("The lack of any authorization for * * * review at the behest of members of the public, when viewed in the context of [other] limits on judicial review and the explicit provision of congressional oversight as a mechanism to keep the [defendants] to [their] statutory duty, strongly suggests that Congress intended no review at the behest of the public.").

³⁰ The court of appeals' ruling also fails to appreciate the interrelationship of the determination to close certain bases, and to reassign functions to various other bases, as part of a single package. If a court enjoins the closing of one base, it will undermine the assumptions on which other parts of the package rest. See Pet. App. 81a (Alito, J., dissenting in part).

gress recognized that delay had been one of the significant causes of the stalemate over base closures. See H.R. Conf. Rep. No. 923, *supra*, at 705 (the prior base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress." Pet. App. 75a (Alito, J., dissenting in part).³¹

To that end, Congress established a rigid series of deadlines and time limits to expedite the base closure process. See pp. 5-7, *supra*. For example, the Act provided for the Secretary of Defense to publish his final selection criteria no later than February 15, 1991, and to publish any amendments to those criteria no later than January 15 in 1993 and 1995. § 2903(b)(2)(A) and (B). For the Secretary's submission of recommended base closures, moreover, Congress set deadlines of April 15, 1991, and March 15 in 1993 and 1995. § 2903(c). The Commission is required to transmit its recommendations to the President by July 1 in each of the three years (§ 2903

³¹ During the July 30, 1991, debate on the joint resolution of disapproval, one of the principal authors of the 1990 Act emphasized the importance of speed and finality in the legislative scheme:

[O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closings were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base were greatly harmed by the persistent uncertainty.

Under this procedure, however, all the communities affected [have] a chance * * * thoroughly [to] make their case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

137 Cong. Rec. H6008 (daily ed.) (Rep. Armev).

(d)(2)(A)), and the President, in turn, must approve or disapprove the list of recommendations by July 15 (§ 2903(e)(1)). Congress then has 45 days to disapprove the list before it takes legal effect. § 2904(b). That strong emphasis on expedition in the process of selection is hardly compatible with the broad availability of judicial review capable of displacing the results of that process thereafter.

b. The emphasis on expedition and finality is confirmed, moreover, by the fact that Congress expressly exempted the process of selecting bases from the requirements of NEPA. As explained above (see p. 3, *supra*), prior to enactment of the 1988 and 1990 Acts, litigants effectively blocked base closures by mounting procedural challenges under NEPA. See H.R. Conf. Rep. No. 1071, *supra*, at 23. In response, the 1990 Act completely exempts the base selection process from NEPA, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. § 2905(c).³² Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra*, at 23. There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring procedural challenges to the selection decision under NEPA while allowing broad procedural attacks

³² NEPA applies only to actions by the Department of Defense "(i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated." § 2905(c)(2)(A). The Act specifically provides that the Secretary is not required under NEPA to consider "the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission" or "military installations alternative to those recommended or selected." § 2905(c)(2)(B)(i) and (iii).

on the way the Commission formulates its nonbinding recommendations to the President. The protracted delays inherent in such litigation would directly undermine the objectives that Congress pursued by adopting a streamlined process and eliminating the threat of disruptive litigation.³³

c. Although the court of appeals acknowledged the 1990 Act's emphasis on expedition and finality, it assumed that those interests lapse once the period for congressional disapproval has expired. Pet. App. 50a-51a. However, even after the base selection process is complete, the 1990 Act places a continuing premium on expedition and finality. Thus, while the 1990 Act permits a limited class of NEPA suits concerning the implementation of individual base closure decisions, the Act subjects such suits to a 60-day time limit. § 2905(c)(3). That strict time limit is inexplicable if speed and finality lose their significance once base closure decisions have become final. Moreover, given the substantial threat to finality and delay from suits like the present one, it is also inexplicable that Congress would have omitted a similar time limitation if it had intended to allow such suits. See Pet. App. 80a-81a n.16 (Alito, J., dissenting in part) ("No statute of limitations was prescribed for a suit of the type at issue here. This seems a clear indication that no such suits were contemplated.").

The court of appeals' narrow view of Congress's concerns with speed and finality also overlooks the cyclical

³³ Contrary to the court of appeals' view (Pet. App. 56a), it is implausible to suppose that Congress's express prohibition of NEPA suits carries the negative implication that other types of procedural claims may be brought under the Act. NEPA cases were the primary litigation-related impediments to base closures. Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3)); hence, it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

nature of the base closure process. The Act provides for three successive biennial rounds of closures (see p. 5, *supra*), and the finality of each round's decisions is vital to planning for the next. Delay caused by litigation over the bases closed during one round would inevitably interfere with successive rounds by creating uncertainty about the existing base structure and capacity of the Armed Services. In short, judicial review, regardless of when it is conducted, cannot be undertaken without jeopardizing the interests in speed and finality emphasized by Congress in the 1990 Act.

4. The legislative history reinforces the strong indicia of unreviewability drawn from the structure and policies of the 1990 Act. As we have already shown, Congress's objective of expedition and finality—which is evident on the face of the Act—is confirmed by legislative history indicating that the 1988 and 1990 Acts were specifically designed to avoid litigation-related delays that had previously shut down the process of base closures. See pp. 2-3, 43-44, *supra*. More directly, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." Pet. App. 73a (Alito, J., dissenting in part). Specifically, the 1990 conference report states:

[N]o final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * *, the issuance of selection criteria * * *, the Secretary of Defense's recommendation of closures and realignments * * *, the decision of the President * * *, and the Secretary's actions to carry out the recommendations of the Commission * * *.

H.R. Conf. Rep. No. 923, *supra*, at 706. That passage provides direct confirmation that the 1990 Act was designed with the understanding that the courts would not police official compliance with statutory requirements in the base closure process.³⁴

5. Finally, judicial intervention would necessarily give rise to severe remedial problems. Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recommendations to the Secretary and Commission for further proceedings in accordance with the Act. Pet. App. 55a n.13. The Commission itself, however, goes out of existence after each of the biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members (other than the Chairman) expire at the end of the Session of Congress in which they were appointed. § 2902(d)(1) and (e)(1). Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been newly constituted for the next biennial round, and at that point, it is occupied with the next set of base closures.

Moreover, the Act expressly provides that, after expiration of the 45-day period for congressional disapproval

³⁴ The court of appeals dismissed the 1990 conference report by arguing that its discussion of reviewability was properly understood in terms of its reference to "final agency action." Pet. App. 53a-54a. In the court's view, the report's reference to "[s]pecific actions which would not be subject to judicial review" (H.R. Conf. Rep. No. 923, *supra*, at 706) merely related back to the previous reference to the lack of finality. For two reasons, however, that conclusion does not advance respondents' position. First, it merely reinforces our contention that judicial review is precluded here because respondents are not challenging "final agency action" within the meaning of the APA. Second, the court itself acknowledged (Pet. App. 54a) that some of the "specific actions" described by the report as unreviewable—such as the "decision of the President"—"concededly do not fit" its explanation that the relevant passage was speaking only to the question of final agency action.

of the President's report and certification, the Secretary of Defense "shall * * * close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e)." § 2904(a) (emphasis added). A court has no authority at that point to interfere with the Secretary's performance of this mandatory duty by reviewing actions of the Secretary or the Commission that took place before the President submitted the report to Congress. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is inconceivable that Congress intended to permit any judicial review of the base closure decisions at all.

C. The Procedural Nature Of Respondents' Remaining Claims Supports The Inference Of Preclusion Of Review

The court of appeals held that although the substance of the base closure decision is unreviewable, Congress did not preclude judicial review of alleged procedural violations of the 1990 Act. Pet. App. 60a-61a, 62a. That distinction does not withstand scrutiny.

First, as explained above (see pp. 2-3, 42, *supra*), the most significant barriers to closing unneeded domestic military installations prior to 1988 consisted of procedural litigation. Congress explicitly made NEPA applicable to base closures in 1977 (10 U.S.C. 2687(b)(2) (Supp. I 1977)), and obligations imposed on federal agencies by NEPA are "essentially procedural." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Thus, if Congress in 1990 had been concerned only with precluding substantive challenges to base closure decisions, it would not have restricted NEPA actions in Section 2905(c) of the 1990 Act. Second, even though the court of appeals purported to limit its decision to procedural matters, judi-

cial review would inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Naval Shipyard and other naval installations. Accordingly, it is clear that even procedural claims of the variety that remain at issue here threaten the expedition and integrity of the process established by Congress—which quite explicitly relies on oversight by the President and Congress to see that the law is observed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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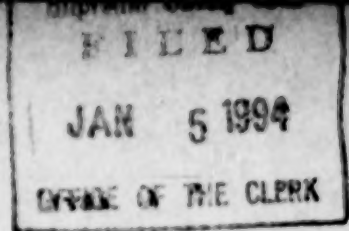
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DECEMBER 1993

(7)
No. 93-289



In The
Supreme Court of the United States
October Term, 1993

JOHN H. DALTON, SECRETARY OF
THE NAVY, *et al.*,

Petitioners,

v.

ARLEN SPECTER, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the President has authority under the Defense Base Closure and Realignment Act of 1990 (the "Act") to order closure of domestic bases absent a valid list of closures submitted by the Base Closure Commission? (Answered in the negative by the court of appeals).

2. Whether the President's "accept all-or-nothing" limited involvement under the Act immunizes from judicial review base closure conclusions that were the product of a flawed and unfair administrative process? (Answered in the negative by the court of appeals).

3. Whether the strong presumption that acts of Congress are subject to judicial review applies where: (a) the express "purpose" of the Act is to provide a "fair process" for base closures; (b) there is no statutory language denying review; (c) the base closure process was flawed; and (d) construction of the Act to preclude judicial review would render it a complete nullity? (Answered in the affirmative by the court of appeals).

4. Whether federal courts have jurisdiction to review deliberate violations of the "fair process" expressly declared to be the "purpose" of the Act when there is no other way to ensure compliance with mandatory statutory safeguards? (Answered in the affirmative by the court of appeals).

5. Whether there is "final" agency action within the meaning of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), after: (a) the Base Closure Commission has submitted its all-or-nothing list to the President, who, within 15 days, accepts it in its entirety – as he must if there are

**COUNTERSTATEMENT OF THE
QUESTIONS PRESENTED – Continued**

to be *any* base closings for the year; (b) the House – after the *maximum* of two hours' debate – fails to pass a resolution of disapproval within 45 days; and (c) the Secretary of Defense begins to close and realign military bases? (Answered in the affirmative by the court of appeals).

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COUNTERSTATEMENT OF THE CASE

As Judge Stapleton of the Third Circuit observed at oral argument, the issues in this case go to the very core of the Republic. Petitioners' argument that there is no judicial review of their deliberate refusal to follow mandatory procedural safeguards of the Base Closure Act would permit the President unilaterally to nullify the will of Congress.¹

Petitioners' egregious violations of the Act in rigging the decision to close the Philadelphia Naval Shipyard (the "Shipyard") constituted nothing less than outright *fraud*. By preventing the most knowledgeable Navy officers from testifying before the Base Closure Commission (the "Commission"), concealing critical Navy documents opposing closure of the Shipyard, holding closed meetings instead of public hearings²

¹ The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808, 10 U.S.C. § 2687 note (Supp. IV 1992) [reproduced at Pet. App. 98a-128a], expressly states that its "*purpose . . . is to provide a fair process. . . .*" § 2901 (emphasis added). On December 10, 1993, the Court of Appeals for the Second Circuit concurred with the Third Circuit's decision herein, holding justiciable allegations that the government "circumvented the base closure process by undertaking a [base] realignment . . . without submitting to the procedures specified" in the Act. *County of Seneca v. Cheney*, ___ F.3d ___, 1993 WL 504463, at pp. 1-2 & nn.2-3 (2d Cir., Dec. 10, 1993).

² Specifically, as alleged by Respondents, on December 19, 1990 and again on March 15, 1991, Admiral Heckman wrote memoranda to the Chief of Naval Operations, Admiral Kelso, urging the Navy not to close the Philadelphia Shipyard. Although Heckman was responsible for oversight of all Naval shipyards, the Navy refused to allow him to become a part of the base closure process. After his retirement from the Navy on May 1, 1991, Admiral Heckman was instructed by the Assistant Secretary of the Navy that he was *not* to testify before the Base Closure Commission at the public hearings on the Philadelphia Shipyard. In addition, a March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to Admiral Kelso recognized that closure of the Philadelphia Shipyard's large drydocks would create a shortfall for the Navy in the event of an emergency. Despite repeated requests by interested members of Congress for all relevant information, the Navy deliberately withheld and

and cynically predetermining the fate of the Shipyard³ by compiling a "stealth list" of closures before the statutory process even began, Petitioners decimated the procedural heart of the Act and the express intent of Congress to provide a "fair process."⁴ [Amended Complaint, ¶220, at App. 54-55]. Petitioners' argument that their illegal acts cannot be reviewed by a court – at any level, in any jurisdiction or under any circumstances – would eviscerate the vitality of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and two hundred years of subsequent constitutional jurisprudence.

Respondents do *not* challenge the substantive merits of the decision to close the Shipyard; they seek only to invoke the historic role of the federal judiciary to "check and balance" a runaway bureaucracy which boldly has disregarded express Congressional mandates critical to a "fair process." To expose the Navy's fraud has required the unprecedented and herculean bipartisan efforts of several members of Congress and the pro bono contribution of a major Philadelphia law firm, together with the extraordinary efforts of the Shipyard workers, their unions, the Governors of Pennsylvania, New Jersey and Delaware and the City of Philadelphia and its Mayor.

Having never anticipated that their fraud would be exposed, Petitioners now resort to the extreme argument that

fraudulently concealed the Claman and Heckman memoranda from the General Accounting Office ("GAO"), the Commission, Congress and the public until after the close of the public hearings. [Amended Complaint, ¶¶96-100, 129, 132-133, 170, at App. 29-30, 34-35, 43].

³ See Amended Complaint, ¶185, at App. 45.

⁴ Obviously stung by the widespread publicity of the Navy's alleged misconduct in the *U.S.S. Iowa* disaster and the "Tailhook" debacle, Petitioners lamely argue that the violations here were merely "routine" and "garden variety." [Petitioners' Brief (hereinafter "Brief") at 14, 34]. However, deliberate violations which go to the very heart of a statute designed to ensure "fair process" in the closure of domestic military bases – decisions that affect the "livelihood and security of millions of Americans" – are hardly "routine" or "garden variety." 56 Fed. Reg. 6374 (Feb. 15, 1991).

even the most brazen and deliberate violations of the Act are beyond judicial scrutiny.⁵ *Not once* in their 48-page brief do they even attempt to explain how this over-zealous interpretation of the Act can be reconciled with its Congressionally declared purpose: "to provide a fair process." Such an interpretation not only cynically ignores the preeminent role of the federal courts as the protector of constitutional rights, but would effectively *repeal* the Act, the guiding purpose of which is to restore procedural integrity to the base closure process.

A. Statutory Background

The Act's express purpose is to ensure a "fair process" and thus eliminate the political machinations and secret deliberations that had pervaded base closure decisions under prior statutes.⁶ The Act vests an independent commission, whose members must be confirmed by the Senate, with the authority to formulate an all or nothing package of bases to be closed – thus depriving both the executive branch and Congress of the discretion to close bases unilaterally. The magnitude of the powers delegated to the Commission makes it critical that the mandatory procedures for evaluating bases and formulating the base closure package are rigorously enforced. Without judicial review, all of the carefully crafted procedural safeguards would be rendered meaningless rhetoric.

⁵ In this case, the District Court dismissed the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, this Court must accept all of its well-pleaded factual averments of a flawed base closure process as true and view them in the light most favorable to Respondents. Fed. R. Civ. P. 12(b)(6); *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

⁶ There is much historical evidence suggesting that the executive branch has used base closings as a potent weapon to punish its political "enemies." See Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331 at n.13 (1991) (Nixon administration closed military bases in Massachusetts shortly after it was the only state to support McGovern in the 1972 presidential elections).

1. Congress first regulated the base closure process in 1966 by requiring the Department of Defense to provide it with 30 days' notice of any ~~base~~ closing. Pub. L. No. 89-188, § 611, 79 Stat. 793, 818 (1965). As conceded by Petitioners:

During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic bases. Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress representing those areas. In addition, opposition to base closures was fueled in part by the perception that the Executive's selection of bases was influenced by improper political considerations. . . . To address those concerns, Congress in 1977 enacted *procedural restrictions on the Executive's authority* to close or realign the size of military bases.

[Brief at 2 (citations omitted) (emphasis added)].

2. Under the 1977 legislation, the Secretary of Defense was prohibited from closing a military base unless he had (1) notified the Armed Services Committees of both the House and Senate, (2) submitted an evaluation to Congress of the likely impact of the closure and (3) afforded Congress 60 days to reject the closure. See 10 U.S.C. § 2687(b) (Supp. IV 1980).

3. Intending to relinquish political responsibility for these sensitive base closure decisions, Congress and the President created an independent base closure commission under the 1988 Defense Base Closure and Realignment Act, Pub. L. No. 100-526. Congressional critics, however, charged that the 1988 commission's final closure decisions were made in secret, on the basis of flawed data, and that the GAO had no opportunity to review and verify the data.

4. On January 29, 1990, the Department of Defense unilaterally proposed to close the Shipyard and 35 other military installations in the United States. Because the Department's list of targeted bases "raised suspicions about the integrity of the base closure process," and to remedy the

lack of fair process inherent in the 1988 legislation, Congress enacted the 1990 Base Closure Act. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3110, 3257.

B. The Defense Base Closure And Realignment Act Of 1990

Petitioners *totally ignore* the indisputable fact that the express "purpose" of the Act is "to provide a *fair process* that will result in the timely closure and realignment of military installations." 10 U.S.C. § 2901(b) (emphasis supplied).⁷ To ensure fairness, the Act creates an *independent* Base Closure Commission to prepare a package of base closures which must be accepted or rejected *in toto* by the President and the Congress.⁸ The Commission is not a perfunctory agency. Its members are endowed with the only authority to determine particular bases for closure. § 2903(d)(2)(b).⁹ However, in exchange for this autonomy in determining bases for closure, Congress mandated a number of non-discretionary procedural safeguards – agreed to by the President when he signed the Act into law – for the Commission's deliberations and conclusions that were absent from predecessor base closure statutes. As Petitioners *concede*:

- The Secretary of Defense *must* prepare and publish, subject to congressional disapproval, a six

⁷ Not one word of Petitioners' Brief reflects any recognition of the express purpose of the Act. Astonishingly, it is simply *ignored*.

⁸ A provision of the Act not invoked in this case permits the President to send the list back to the Commission once. The Commission may or may not then revise the list, but, in any event, when resubmitted to the President, it must be accepted or rejected *in toto*. § 2903(e). If rejected, there will be *no* base closings for that year. § 2903.

⁹ The Commission's members are appointed by the President only after consultation with Congress and confirmation by the Senate. § 2902(c).

year "force structure" plan assessing potential national security threats and the military force structure necessary to meet such threats. § 2903(a)(1)-(2), [Brief at 5];

- The Secretary *must* prepare and publish, subject to congressional disapproval, specific criteria for use in identifying military installations to be closed or realigned. Among the eight closure criteria promulgated by the Secretary is the "economic impact on communities" of a closure or realignment. 56 Fed. Reg. 6374 (Feb. 15, 1991), [Brief at 5];
- The Secretary's closure recommendations *must* be based upon the published force structure plan, the published base closure criteria and the relevant "data base." § 2903(c), [Brief at 5];
- The Secretary *must* transmit to both the Commission and the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments," so that the GAO can assist the Commission in its deliberations. § 2903(c)(4), [Brief at 39 & n.26];
- The Commission *must* conduct public hearings on the Secretary's recommendations and must open all its deliberations to the public, except where classified information is discussed. § 2902(e)(2)(A), [Brief at 5-6].

The President has a mere 15 days to accept or reject the list submitted by the Commission in its entirety. If approved, the unchangeable list next goes to Congress, which is given a maximum of only 45 days to disapprove the package as a whole and but 2 hours to debate the matter. § 2908(d)(2).

It is unthinkable that Congress – having gone to such great lengths to create an act for the very "purpose" of

ensuring a "fair process" – intended to strip the federal judiciary of its historic role to check the bureaucracy's homework. The facts of the case now before this Court – where a fraudulent process will survive unchecked if Petitioners have their way – powerfully illustrate that such a construction of the Act would render it a complete nullity.

C. The Proceedings Below

1. On April 15, 1991, Secretary of Defense Richard Cheney submitted an extensive list of military installations to be closed or realigned to the 1991 Base Closure Commission. The Shipyard was one of the installations targeted for closure. The decision to close the Shipyard was the product of an admittedly *flawed and unfair* process. Contrary to the Act's express mandates, the Secretary, *inter alia*, concealed key Navy documents recommending that the Shipyard remain open, prevented the most knowledgeable commanding Naval officer from testifying before the Commission and failed to provide the GAO and the Commission with adequate documentation to support his recommendation for closure. In fact, the decision to close the Shipyard had been predetermined without any procedural safeguards and recorded on a "stealth list" formulated in secret before the 1990 Act was even passed.¹⁰ *See* note 2, *supra*.

The GAO concluded that, because of lack of documentation, *it could not perform its statutory duty* to review the Navy's decision.¹¹ In an illegal attempt to "try to resolve missing gaps in the information provided," the Commission held closed meetings with the Navy after the public hearings

¹⁰ The Act expressly forbids the Secretary of Defense from considering any military installation on the basis of prior Department of Defense base closure considerations or recommendations. § 2903(c)(3).

¹¹ Indeed, the GAO Report concluded that the Navy's recommendations and process were *entirely* inadequate in violation of numerous provisions of the Act. [Amended Complaint, ¶¶139, 142-146, 151-152, at App. 36-39].

were completed during which it received documentation necessary to rationalize its predetermined conclusions. [Amended Complaint, ¶¶159-164, at App. 40-41]. On June 23, 1991, upon completion of its badly flawed process, the Commission submitted to the President an "indivisible package" of base closures that included the Shipyard.

3. Respondents filed their Complaint on July 9, 1991, and an Amended Complaint on July 19, 1991, seeking to enjoin the Secretary from closing the Shipyard because a fundamentally flawed process had tainted the results. Respondents alleged – and those allegations must be deemed true for purposes of this appeal, *see* note 5 *supra* – that the Secretary and the Commission had deliberately failed to comply with non-discretionary procedural mandates of the Act. On July 15, 1991, the President nevertheless approved the Commission's entire package of closures, and on July 30, 1991 (less than 15 days later), the House of Representatives, after only 2 hours of debate, rejected a resolution disapproving the Commission's recommendations. On August 30, 1991, the Secretary began closing targeted military installations.

4. On November 1, 1991, following expedited discovery and a hearing on Respondents' motion for preliminary injunctive relief, the District Court erroneously dismissed the Amended Complaint on the ground that the legislative history of the Act reflected a congressional intent to abrogate all judicial review. *Specter v. Garrett*, 777 F. Supp. 1226, 1227-28 (E.D. Pa. 1991).¹²

5. On April 17, 1992, the Court of Appeals reversed, holding that there was "no clear evidence of congressional intent to preclude all judicial review." *Specter v. Garrett*, 971 F.2d 936, 949 (3d Cir. 1992). The court concluded that the judicial branch has the power and duty to review violations of

¹² Alternatively, the District Court found Respondents' claims non-justiciable under the "political question" doctrine. *Specter v. Garrett*, 777 F. Supp. at 1227-28. That ruling, however, was reversed by the Third Circuit and as Petitioners' "Statement of Questions Presented" makes clear, is not an issue before this Court. [Brief at I].

the Act's mandatory non-discretionary procedures. 971 F.2d at 936.

6. On November 9, 1992, this Court granted *certiorari* and remanded the case to the Third Circuit for consideration of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). On remand, the Third Circuit found no reason to change its prior holdings.¹³

7. On August 28, 1993, Petitioners again sought *certiorari*, which was granted on October 18, 1993. For the following reasons, it is respectfully submitted that the decisions of the Court of Appeals for the Third Circuit should be affirmed.

SUMMARY OF THE ARGUMENT

Confronting "suspicions about the integrity of the base closure selection process," H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), Congress adopted the 1990 Base Closure Act as the "exclusive means for the closure of domestic bases." *Specter v. Garrett*, 971 F.2d at 947 (quoting § 2909(a)). The Act's express "purpose" is to ensure a fair process in the closure of domestic military bases. Petitioners argue that even a fundamentally flawed process is immune from judicial review. This strained interpretation ignores two centuries of precedent holding that, to protect our democracy, congressional limitations on delegated authority will be enforced by an independent federal judiciary. Nothing in

¹³ Petitioners suggest that the Third Circuit, on remand, based its conclusion of judicial review on constitutional grounds not raised by the parties. However, Respondents did argue the principle that drives the constitutional issue here: the executive branch is not above the law. Even if Petitioners were correct, however, it is a fundamental principle that an appellate court may affirm a decision on any ground supported by the record, even on a ground rejected by a lower court. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (prevailing party may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered" below) (citing *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

Franklin abrogates this historic role of the federal judiciary. Petitioners seek to obscure the core issues in this case by presenting hypertechnical, abstruse arguments which, if accepted, would eviscerate the meaning and purpose of the Act and create a most dangerous precedent.

I.A. The Third Circuit's opinions are consistent with *Franklin*. The Third Circuit concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates have exceeded powers under applicable statutes or the Constitution.

B. *Franklin* does not alter the federal judiciary's historic role of ensuring that presidential conduct does not exceed statutory or constitutional authority. In fact, *Franklin* (the latest in a line of decisions stretching back nearly 200 years) confirms that presidential action may be reviewed even if review is not permitted under the Administrative Procedure Act ("APA"). Consistent with *Franklin*, the Third Circuit's initial opinion held that presidential conduct is subject to judicial review, independently of the APA, where it exceeds the scope of statutory or constitutional authority. On remand, the Third Circuit confirmed, holding that the President's approval of a procedurally flawed closure package exceeded his authority and thus raised a judicially reviewable separation of powers issue. Although Petitioners argue that the Third Circuit erred in relying on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court in *Franklin* itself cited *Youngstown* for the proposition that non-APA review of presidential acts is permissible where the President has exceeded his authority.

C. The unique facts which led this Court in *Franklin* to hold that the agency action was not final do *not* apply to the independent Base Closure Commission's report to the President, which must be accepted or rejected *in its entirety* within 15 days of receipt. In contrast to *Franklin*, where the President had complete discretion to reject or ignore the recommendations of the Secretary of Commerce and substitute his own data, the President *cannot* unilaterally amend or modify the base closure package, *nor* is he authorized to add or eliminate individual bases to the closure list. Indeed, the

President has neither the time nor the means to verify that the base closure package has been lawfully prepared pursuant to the "fair process" mandated by Congress.

Instead, the President must rely on the Commission's process in preparing the list. As the Third Circuit emphasized:

Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

971 F.2d at 947 (emphasis added). The Commission's actions are thus "final" for purposes of judicial review.

II. The Third Circuit correctly held that there was *not sufficient evidence to rebut the strong presumption that Congress intended judicial review of violations of the Act's procedural mandates*. While conceding that there is a strong presumption in favor of judicial review and that the Act does not expressly prohibit such review, Petitioners nonetheless suggest that the Act's structure, purpose and legislative history reflect "clear and convincing" evidence of a congressional intent to deny all judicial review, even review of constitutional and statutory violations. However, Petitioners' construction would render the Act a nullity since its mandate of a "fair process" could be flouted, as it deliberately was here, by the executive branch and its bureaucracy at will. If Congress had intended that result, it simply could have permitted the executive branch to close bases for any reason at all.

A. Petitioners argue that the base closure process under the Act is immune from judicial review because it implicates matters of "national security" or "sensitive questions of military policy." However, base closures that deal with matters of national security are *expressly exempt* from the Act. 10 U.S.C. § 2909(c)(2).

B. Petitioners' Brief totally *ignores* the Act's express "purpose," *i.e.*, to ensure a "fair process," and inexplicably

fails to contain even a *single reference* to this essential consideration. Their analysis, by definition, is thus as fatally flawed as the process it seeks to defend.¹⁴

C. Petitioners point to one ambiguous excerpt in the Act's Conference Report to support their position on judicial review. Their strained contention fails in light of the structure of the Act, its purpose and its legislative history, all of which unmistakably cry out for the federal courts to exercise their historic powers of review.

D. The text of the Act itself confirms the *availability* of judicial review. The Act's express limitation of review under the National Environmental Policy Act ("NEPA") demonstrates that Congress knew how to limit judicial involvement when it so intended. That it chose to do so only with respect to NEPA, *not* with respect to review of procedural violations of the Act, is compelling evidence that Congress intended judicial review.

III. If the Act were read to eliminate all judicial review, two constitutional problems would arise. First, Congress cannot delegate authority to close military bases to an independent, non-elected Commission unless judicial review is available to determine whether the Commission has acted within the scope of its authority. Without judicial review, the Act would represent an unconstitutional delegation of legislative authority. Second, abrogation of judicial review of claims arising under the Constitution is itself constitutionally suspect and intrudes upon the federal judiciary's role to protect the separation of powers. To avoid needlessly addressing these constitutional issues, this Court should construe the Act to provide for judicial review of Respondents' claims.

¹⁴ Petitioners erroneously suggest that a flawed process can be overcome through "substantial" presidential and congressional oversight. As discussed *infra* at pp. 29-32, 43-44, the President has a mere 15 days to accept or reject the Commission's indivisible list of closures and Congress has only 45 days (with a total of 2 hours of debate) to pass a joint resolution rejecting the list. §§ 2903(e), 2904(b), 2908(c)-(d).

ARGUMENT

I. *FRANKLIN v. MASSACHUSETTS* SUPPORTS JUDICIAL REVIEW.

A. The Third Circuit's Opinions Are Consistent With *Franklin*.

Under the "automatic reapportionment statute" at issue in *Franklin*, the Secretary of Commerce was required to report census data to the President, who then applied a formula specified in the statute to determine the number of representatives allocated to each state. 112 S.Ct. at 2771. No particular procedural safeguards were mandated for the Secretary to follow. The President subsequently transmitted the results to Congress for implementation of the decennial reapportionment. The Secretary included in her census report federal employees living abroad (primarily military personnel) as residents of their "designated" home state. Plaintiffs sought review of this report under both the APA and the constitution.¹⁵ *Id.* at 2773.

The district court found for plaintiffs on their APA challenge and ordered the President to recalculate congressional apportionment using census figures that did not include overseas federal employees. *Id.* Reversing the district court in a direct appeal, this Court held that the Secretary's report to the President constituted mere "tentative recommendations" and was not "final" agency action subject to judicial review because the automatic reapportionment statute did not require

¹⁵ The Secretary's decision to include the disputed federal employees in the 1990 census caused one House seat to be shifted from Massachusetts to the State of Washington 112 S.Ct. at 2770. Plaintiffs argued that the Secretary's action was arbitrary and capricious because there was substantial evidence that when military personnel designated their home state upon induction, they disproportionately selected a state with low income tax rates rather than their actual home state. *Id.* at 2771-73. Plaintiffs' constitutional challenge was based on their argument that the inclusion of federal employees living abroad violated the requirement that the census be conducted through an "actual enumeration" of persons living within a state. *Id.* at 2773.

the President to accept or even consider the Secretary's census figures. He could act totally independently from the Secretary or instruct the Secretary to reform the census. *Id.* at 2774.

Franklin further held that the President's actions were not reviewable under the APA because the President is not an "agency" within the meaning of that statute.¹⁶ *Id.* at 2775. This Court expressly confirmed, however, that regardless of his status under the APA, "the President's actions may still be reviewed for constitutionality." *Id.* at 2776.

Although the Third Circuit's initial opinion in this case was rendered before *Franklin*, it is consistent. The Third Circuit concluded that judicial review under the Act is appropriate after the Base Closure Commission's list has been transmitted by the President to Congress and not rejected within 45 days. In addition, the Third Circuit, anticipating *Franklin*'s ruling that the President is not an "agency" under the APA, assumed for the purpose of its analysis that presidential conduct is *not* subject to judicial review under the APA's "arbitrary and capricious" standard.

The Third Circuit nonetheless concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates exceeded their powers under applicable statutes or the Constitution. The Third Circuit's opinion on remand, citing *Youngstown* – a case also relied on by *Franklin* – confirmed this basic precept of American jurisprudence. See *Specter v. Garrett*, 995 F.2d at 409. Thus, both *Franklin* and the Third Circuit's opinions

¹⁶ The Court explained: "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the APA's textual silence did not provide an adequate basis to assume that Congress intended that the President's performance of "statutory duties be reviewed for abuse of discretion." 112 S. Ct. at 2775.

hold that where the President exceeds the scope of his statutory or constitutional powers, judicial review *must* be available to preserve the tripartite structure of our constitutional form of government.¹⁷

B. *Franklin* Confirms The Historic Power Of The Federal Judiciary To Restrain Executive Branch Conduct Violating The Constitutionally Mandated Separation Of Powers.

Nothing in *Franklin* even purports to disturb the federal judiciary's historic role of ensuring that presidential conduct does not exceed constitutional or statutory boundaries. On the contrary, *Franklin*'s narrow holding that the President is not an agency under the APA has *no* effect on the fundamental principles governing judicial review that originated nearly 150 years before the APA's enactment. See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (President's instructions that went beyond scope of congressional authorization could not "legalize an act which without those instructions would have been a plain trespass"). See also *Interstate Commerce Comm. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"); *A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) ("The purpose of [the APA] was to extend judicial review that had previously existed and to proscribe procedure and scope of judicial review. Such judicial review as existed outside of the Act remained unfettered by it.").¹⁸

¹⁷ Petitioners cite no authority for their argument that there is a meaningful distinction between presidential actions taken in excess of statutory authority and actions taken contrary to a constitutional provision. No case has ever suggested that the federal judiciary does not possess the constitutional power to review under the separation of powers doctrine the actions of the President for statutory or constitutional compliance.

¹⁸ Petitioners rely on *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as support for the total abrogation of judicial review under the Act.

Rather than limiting *Youngstown* (or any other source of judicial review of presidential conduct other than under the APA's "arbitrary and capricious" standard), *Franklin* relied on *Youngstown* for the proposition that the President's conduct is subject to review for constitutionality. The Third Circuit also properly relied on *Youngstown* to conclude that the President's conduct is subject to constitutional review where he exceeds the scope of authority granted by Congress under the Base Closure Act. *Franklin* is thus not only consistent with, but affirmatively supports, the decision below.

1. Executive Branch Conduct That Violates The Scope Of Authority Delegated By Congress Or The Constitution Will Be Enjoined To Preserve The Constitution's Separation Of Powers.

The Constitution divides governmental power into three branches: the legislative, the executive and the judicial. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). That division of powers and functions "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that was drafted in Philadelphia in the Summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The Constitution separates the branches of government "not to promote efficiency, but to preclude the exercise

Significantly, just three weeks ago, the Second Circuit in *County of Seneca*, ___ F.3d ___, 1993 WL 504463 (2d Cir., Dec. 10, 1993), agreed with the Third Circuit that violations of the Act's fair process mandate are judicially reviewable. See note 1, *supra*. To the extent *Cohen* even applies, it is plainly wrong. *Cohen* affirmed summary judgment for the government on the ground that the Commission's transmittal of the base closure package to the President was not final agency action within the meaning of *Franklin*. For the reasons stated herein, that ruling was erroneous. See discussion *infra* at pp. 29-32. Moreover, *Cohen* did not even purport to address the federal courts' historic powers (outside of the APA) to review presidential conduct which exceeds statutory or constitutional authority. Without a valid package, the President simply lacks the authority to act. See discussion *infra* at pp. 20-27.

of arbitrary power" and to "save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). To protect that vital safeguard of liberty, the *Youngstown* Court enjoined enforcement of a presidential order that exceeded both the scope of authority granted by Congress and that granted under Article II of the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). See also Hamilton, *The Federalist No. 78* ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

Franklin's reliance on *Youngstown* was well placed. In April, 1952, at the height of the Korean conflict, the steelworkers' unions gave notice of a nationwide strike. To ensure continued production of essential war materials, President Truman ordered the Secretary of Commerce to seize and operate the steel mills. Justice Black's "Opinion of the Court" first recognized that the President's authority was limited by the Constitution's separation of powers:

The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

343 U.S. at 587.

Finding the President without either constitutional or statutory authority to order the seizure of private industries – regardless of the asserted military crisis – the Court declared the President's order illegal and affirmed the injunction against the Secretary entered below. See Currie, *The Constitution in the Supreme Court: 1888-1986*, p. 369 (Chicago 1990) ("*Youngstown* . . . stands as an eloquent reminder that the President must obey the law and that in general he may act only on the basis of statute.").

The pole-star of *Youngstown* – that the executive branch is bound by express limitations on authority granted by Congress and the Constitution – is almost as old as the Republic itself. In *Little v. Barreme*, an action for damages was brought against the commander of an American warship for his capture of a Dutch commercial vessel on the open seas. The commander defended his seizure on the grounds that: 1) the President had instructed naval commanders to seize American vessels bound to or from French ports; and 2) there was probable cause to believe the ship of American origin. In fact, the *Flying Fish* was of Dutch, not American origin. More critically, however, the statute under which the President issued the instructions only authorized the seizure of American vessels sailing to French ports, and the *Flying Fish* had been seized on its way from a French port.

While noting that it was “by no means clear” that the President lacked constitutional authority to order the seizure as Commander-in-Chief, Justice Marshall nonetheless emphasized that Congress *had* prescribed limited grounds for seizure. 2 Cranch at 177-78. Justice Marshall thus concluded that, as the President’s instructions had gone beyond the scope of the limited congressional authorization, they could not “legalize an act which without those instructions would have been a plain trespass.” *Id.* at 178. See also *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) (“[I]t would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”).

Youngstown and *Little* stand for a principle at the very core of our constitutional government – that where the President or subordinate executive officers act beyond the scope of their legal authority, judicial relief must be available to protect the separation of powers. See also *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (“When judicial action is needed to serve broad public interests . . . as when the Court acts, not in derogation of separation of powers, but to maintain their

proper balance . . . that exercise of jurisdiction has been held warranted”); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) (“This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution. . . .”); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (“[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress”). Nothing in *Franklin* abrogates that critical role of the federal judiciary. And nothing in the Third Circuit’s opinions below is inconsistent with *Franklin*.¹⁹

2. Judicial Review Is Available To Secure Executive Branch Compliance With The Mandatory Procedural Requirements Of The 1990 Base Closure Act.

Petitioners concede that their *only* authority to close domestic military bases is that which they obtained from Congress under the Base Closure Act: “Neither the President nor petitioners have relied on inherent Article II powers in selecting the Philadelphia Naval Shipyard for closure.” [Brief at 33]. It is likewise undisputed for the purposes of this appeal that they deliberately ignored congressionally mandated procedural safeguards in determining to close the Shipyard. Thus, Petitioners, having acted without either statutory

¹⁹ Even Justice Scalia’s separate opinion in *Franklin*, although suggesting that separation of powers concerns should prevent a federal court from entering injunctive relief against the President, nonetheless distinguished between an injunction against the President directly and one against a subordinate executive officer attempting to carry out an illegal presidential directive. Justice Scalia’s reluctance to allow the former did not:

in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive.

112 S. Ct. at 2790 (emphasis in original) (citing *Youngstown*). In the present case, Respondents seek to enjoin the Secretary of Defense, not the President, from closing the Shipyard.

or constitutional authority, cannot close the Shipyard. *Youngstown* and *Franklin* both support the Third Circuit's holding that judicial review is available to enjoin Petitioners from exceeding the scope of their legal authority.

(a) The President Was Without Statutory Authority To Approve A Base Closure Package Prepared In Violation Of The Congressional Mandate.

Petitioners first suggest that *Youngstown* can be distinguished because it involved an assertion of presidential authority that Congress had specifically rejected when it refused to amend the Taft-Hartley Act to permit executive branch seizure of private industry. In contrast, Petitioners argue, the Base Closure Act authorizes the President to accept or reject the Commission's indivisible base closure package for any reason at all. Thus, according to Petitioners, the President's limited involvement under the Act places the entire base closure process beyond judicial review, even though the Secretary and the Commission deliberately violated congressional mandates in performing their respective statutory duties.²⁰

²⁰ In fact, *Franklin* itself suggests that no amount of statutory discretion can ever insulate a President from the illegal conduct of subordinate executive officers. In holding the President's conduct subject to constitutional review regardless of APA status, and despite the lack of finality of the Secretary's tentative census report, the *Franklin* Court nonetheless examined whether "the Secretary's allocation of overseas federal employees to the States violated the command of Article I, § 2, cl. 3, that the number of Representatives per State be determined by an 'actual Enumeration' of 'their respective Numbers.'" 112 S. Ct. at 2777 (emphasis added). Nothing in *Franklin* suggested that federal overseas employees were included in the 1990 census at the President's direction or that the President was required by statute to approve the Secretary's methods. Yet nothing in *Franklin* suggested that the majority had changed its mind and decided to review the Secretary's conduct, regardless of finality. Thus, *Franklin* reviewed only the **President's** conduct in deciding whether the **Secretary's** census method violated the Constitution.

Petitioners radically misconstrue both the nature of the statutory scheme at issue here and the nature of the President's limited involvement within that scheme. As the Third Circuit recognized, the President's *only* authority under the Act is to approve or reject a base closure package which was prepared in accordance with the statutory procedures:

[W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.*

* * *

[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process.

995 F.2d at 407, 409 (footnote omitted) (emphasis partly in original).

The President has no greater statutory authority to approve a materially flawed base closure package than he has to submit to Congress a closure package of his own independent creation. Where the Act's non-discretionary statutory safeguards have been ignored, the President receives nothing from the Commission upon which he has statutory authority to act. Hence, the President's "approval" of the 1991 base closure package was "without authority of law, illegal and void." *Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to

provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void").

As with the Base Closure Act, the statutory scheme in *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349 (D.C. Cir. 1965), required presidential approval of agency determinations. Specifically, the statute authorized the President to approve or reject decisions of the Civil Aeronautics Board (the "Board") affecting overseas air carriers. Seventeen years earlier, in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), this Court had declared that, in light of the President's broad constitutional authority over foreign affairs, his statutory approval of a Board determination was not subject to judicial review on the ground that the Board order lacked "substantial evidence." *Id.* at 111-12.²¹

Chief Justice (then Judge) Burger distinguished *Waterman* as involving only whether the Board determination was supported by "substantial evidence." 348 F.2d at 353. In contrast, plaintiffs in *American Airlines* alleged that the Board acted beyond the scope of statutory authority in authorizing "split charter" arrangements. *Id.* at 351. In finding that *Waterman* did not preclude review of the President's approval

²¹ Although the *Waterman* majority did not specify the nature of the plaintiffs' challenge to the Board order at issue, the dissent noted that plaintiffs had alleged the Board lacked "substantial evidence" to support its findings. 333 U.S. at 117. In any event, the majority did note that the Board proceedings were not being "challenged as to regularity." *Id.* at 105. Based on that language, subsequent courts have distinguished *Waterman* as not involving a claim that the Board exceeded the scope of its statutory authority. See *Alaska Airlines, Inc. v. Pan American World Airways, Inc.*, 321 F.2d 394, 396 (D.C. Cir. 1963) ("[*Waterman*] neither settles nor illuminates more than faintly the issues which would face a court reviewing the authority of the Board"); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (Burger, J.) (*Waterman* has no relevance where "the President purports to approve a recommendation which the Board was powerless to make").

of a Board determination itself violating statutory authority, Judge Burger held:

The deference *Waterman* accords to presidential discretion in matters of national defense and foreign policy as they bear on overseas air carriers has no relevancy where, as here alleged, the President purports to approve a recommendation which the Board was powerless to make; if indeed the Board has no power, then as a legal reality there was nothing before the President.

Id. at 353 (emphasis added). See also Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) ("if the President cannot act without a Board recommendation, it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive himself was acting within his statutory authority").

From the outset, Respondents have alleged that the Secretary and the Commission acted beyond the scope of congressional authority in preparing the 1991 base closure package. And as the Third Circuit acknowledged, the President's own statutory authority is "expressly confined by Congress to action based on a particular type of process." Because that process was materially flawed, the President had no lawful base closure package upon which he could act. The President's purported approval of the defective package, and his transmission of that defective package to Congress, were thus beyond the scope of the statutory authority delegated to him by Congress. Both *Youngstown* and *Franklin* establish that, to protect the constitutionally mandated separation of powers, the President's involvement in the base closure process must be subject to judicial review.

(b) Where The Executive Branch Exceeds The Scope Of Authority Delegated By Congress, It Necessarily Breaches The Constitutionally Mandated Separation Of Powers.

While Petitioners concede that *Franklin* permitted constitutional review of the President's conduct, they contend that *Franklin's* holding is not relevant here because the President violated only a statute, not the Constitution. In contrast, Petitioners suggest, *Franklin* reviewed whether the Secretary's census method violated a specific provision of the Constitution. *Without citing any authority*, Petitioners assert that the distinction between presidential conduct that violates the constitutionally mandated separation of powers, and presidential conduct that violates specific constitutional provisions, makes a difference with respect to the availability of judicial review under the Base Closure Act. That argument must be flatly rejected.

In holding the President's conduct subject to constitutional review, *Franklin* relied squarely on *Youngstown*. Yet *Youngstown* itself relied on the separation of powers precepts that are not traceable to any specific constitutional provision, but instead are "woven into the document" as a whole. See *Buckley*, 424 U.S. at 123. *Youngstown* examined not just whether the executive branch violated a single constitutional provision, but whether the President's conduct had breached the very fabric of our constitutional order. The President's violation of the Base Closure Act raises constitutional concerns no less compelling.

Thus, the Third Circuit properly relied on both *Franklin* and *Youngstown* in holding that judicial review is available to determine whether the President exceeded the scope of his statutory authority in approving the 1991 base closure package. As recognized below:

We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take

and that judicial review is available to determine whether such authority exists. *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. Indeed, we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*.

995 F.2d at 409 (citations and footnote omitted).

Whether judicial review in this case is labeled "constitutional review," or a "form" of constitutional review, is not important. Regardless of label, judicial review of the President's compliance with the law is an absolute necessity if the separation of powers is to serve the purpose for which it was designed. See *American School of Magnetic Healing v. McAnulty*, 187 U.S. 94, 108 (1902) ("The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of his authority or under an authority not validly conferred").

(c) **For The Purpose Of Determining The Scope Of Judicial Review, No Distinction Can Be Made Between Constitutional Claims Involving Separation Of Powers Issues And Claims Involving Constitutionally Protected Property Interests.**

Finally, Petitioners attempt to distinguish *Youngstown* as involving constitutionally protected private property rights. In contrast, Petitioners suggest, the "constitutional" issue raised here involves the separation of powers. Petitioners fail to explain, however, why that distinction should make any difference, particularly since the decision below sustaining Respondents' standing is not on appeal here. Clearly, Petitioners elevate form over substance.

In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), a constitutional challenge to the "legislative veto," this Court rejected a similar attempt to elevate "private" constitutional rights over constitutional claims involving separation of powers issues:

We must . . . reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests. . . . If the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled.

Id. at 935-36 (citation omitted). See also *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty"); Madison, *The Federalist No. 51* ("the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights").

Here, as in *Chadha*, if Respondents prevail on their argument that judicial review is necessary under the Act to implement the intent of Congress, and if they are able to enjoin the Shipyard's closure, their private interests will certainly be advanced. *Franklin's* constitutional challenge to the

Secretary's census allocation of overseas federal employees involved no more of a "private" constitutional right than the separation of powers challenge raised by Respondents here. To conclude that Congress intended to give the executive branch unlimited power to close military bases for whatever reason it deemed proper (or for no reason at all) would render the Act meaningless. See, e.g., *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy". . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("we must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

3. **Franklin Must Not Be Read To Eviscerate The Congressional Mandate Of Fair Process In The Closure Of Domestic Military Bases, Thereby Nullifying The Act.**

Limited presidential involvement in a statutory scheme cannot give the imprimatur of legality to executive branch conduct brazenly violating congressional mandates. When Congress declared a statutory "purpose" – i.e., to ensure a "fair process" – it certainly never intended for the executive branch to decide for itself whether the law should be obeyed. See *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). The power of this argument is dramatically confirmed by Petitioners' astonishing failure to deal with it. Not even once in any of the 48 pages of their Brief do Petitioners acknowledge the declared "purpose" of the Act. They disingenuously ignore it – just as they boldly ignored the Congressional mandates designed to ensure the "fair process."

The fallacies in Petitioners' interpretation that there is no judicial review are illustrated by the following hypothetical. Assume that: (1) totally ignoring his statutory duty (§ 2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather based upon his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) despite knowledge of these violations and in violation of its own statutory duties (§ 2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider a joint resolution of disapproval within 45 days, and after only 2 hours of debate; and (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live – all *without* a fair process.

Petitioners' strained interpretation would preclude judicial review of even the most blatant, arbitrary and unlawful executive branch disregard of the procedures mandated by Congress to ensure a "fair process." That remarkably extreme argument cannot be squared with *Youngstown's* fundamental principle that the "Constitution is neither silent nor equivocal about who shall make the laws." As Justice Frankfurter cautioned in *Youngstown*:

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

343 U.S. at 594 (Frankfurter, J., concurring).

C. Because The President Has No Authority To Accept A Base Closure Package Which Was The Product Of An Unfair Process, The Commission Report Is "Final" For The Purpose Of Judicial Review.

The Base Closure Act and the automatic reapportionment statute in *Franklin* do not share "similar statutory schemes." In *Franklin*, the act imposed no procedural requirements on the Secretary of Commerce and the Secretary's report to the President carried "no direct consequences" and had "no direct effect." 112 S. Ct. at 2774. Indeed, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner as to completely change the outcome of reapportionment. *Id.* (statute did not "require the President to use the data in the Secretary's report"). In fact, a Department of Commerce press release, issued the same day that the Secretary presented her report to the President, expressly confirmed that "the data presented to the President was still subject to correction." *Id.*

In stark contrast to the statute in *Franklin*, the Base Closure Act does not permit the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety and is not permitted to "cherry-pick" – *i.e.*, to add or eliminate individual bases.²² As Petitioners concede:

A critical feature of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard* the Commission's role in the process, the Act provides that its recommendations *must* be considered as an *indivisible package*. H.R. Conf. Rep. No. 923, *supra*, at

²² The Act does not permit either the President or Congress to target any individual base or group of bases for closure. The list must be accepted or rejected by the President and Congress as presented. Thus, neither the President nor Congress could close a base not included on the Commission's indivisible base closure list.

704. The President may trigger base closures under the Act only by approving 'all the recommendations' of the *independent* Commission.

[Brief at 40 (emphasis added)]. The Act does not give the President either the time²³ or the resources to determine whether Petitioners complied with the Act's procedural mandates; indeed, that historically has been the function of the judiciary. *See Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and [defining] their jurisdiction").

The President must rely exclusively on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the mandated procedural safeguards that are the *raison d'être* of the Act. *See, e.g., Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void"); Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 700 (1961) (supporting "decisions holding that the courts will determine whether the Commission has complied with the statutory requirements regarding notice and hearing and, finding such defects, will hold invalid a presidential proclamation based on such an investigation"). For the base closure process to function as Congress intended and for the President's decision to be informed and responsible, the Act's procedural mandates must be complied with at the *agency* level. The agencies' actions must therefore be "final" for the purpose of judicial review. *See Franklin*, 112 S. Ct. at 2773 ("core

²³ *See* 10 U.S.C. § 2903(c) (President has only 15 days to review Commission's report).

question" regarding finality is whether "the agency has completed its decisionmaking process" and whether "the result of that process is one that will directly affect the parties").

Petitioners thus err in stating that the Act "makes the President *personally* responsible for base closure decisions, and provides for extensive congressional involvement and *oversight* in the process." [Brief at 15]. Petitioners themselves concede elsewhere in their Brief that Congress and the President intended to *avoid* responsibility for politically sensitive closure decisions by delegating their authority to target bases for closure to an independent commission. [Brief at 2-3]. The Secretary and the Commission alone are subject to the Act's procedural requirements and where those mandates have been ignored, the President is left without a legal package of base closures upon which to act. *See American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (if agency action was without statutory authority, "then as a legal reality there was nothing before the President"). *See also* Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) (where the President cannot act without agency recommendation, "it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive was himself acting within his statutory authority.").

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result could not have been intended by this Court in *Franklin*. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J. concurring) ("It may be presumed that Congress does not intend administrative agencies,

agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands . . . "); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Indeed, to apply *Franklin* in the sweeping manner urged by Petitioners would eviscerate the two centuries of pre-*Franklin* precedent sustaining judicial review of agency action.

II. THE STRONG PRESUMPTION OF JUDICIAL REVIEW UNDER THE ACT HAS NOT BEEN REBUTTED BY "CLEAR AND CONVINCING EVIDENCE."

It is axiomatic that judicial review of final agency action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). It is "presume[d] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen*, 476 U.S. at 681. This strong presumption in favor of judicial review can be overcome only upon a showing of "clear and convincing" evidence of a contrary congressional intent. *Id.* As emphasized in *Bowen*:

We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' [citation omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'

* * *

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the Administrative Procedure Act the Senate Committee on the Judiciary remarked:

'Very rarely do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board.' [citation omitted].

* * *

The Committee on the Judiciary of the House of Representatives agreed that Congress *ordinarily intends that there be judicial review*, and emphasized the clarity with which a contrary intent must be expressed:

'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.' [citation omitted].

476 U.S. at 670-71 (emphasis added). See also *Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("[I]t is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue"). Accord, Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 403 (1958) ("there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon

executive power by the constitutions and legislatures"); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) ("statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases").

As Petitioners concede, the Act contains no express limitation on judicial review. That is itself evidence that Congress intended judicial review, since when Congress intends such a radical departure from tradition, it knows how to do so in plain language.²⁴ Indeed, as Petitioners themselves point out, in the *very statute at issue in this case*, Congress expressly limited procedurally-oriented challenges under NEPA, thereby conclusively demonstrating that it knew how to abrogate procedural challenges if it wanted to. See Brief at 43-44. Therefore, the complete absence of any language in the Base Closure Act expressly precluding judicial review must be deemed intentional, particularly in light of the express statutory purpose of ensuring a "fair process." See *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 97-99 (1991).

In addition, as the Third Circuit held, neither the structure nor the legislative history of the Act contain evidence of congressional intent to abrogate judicial review. 971 F.2d at 949-50 ("we find no clear evidence of a congressional intent to preclude all judicial review other than limited NEPA review"). The presumption in favor of judicial review is of even greater force where, as here, it is alleged that the

²⁴ See, e.g., The Regulatory Flexibility Act of 1980, 5 U.S.C. § 611(a)-(b) (1982) (expressly precluding substantive and procedural judicial review of an agency's compliance with the Act); Export Regulations of the War and National Defense Act, 1979, Pub. L. No. 96-72, 50 U.S.C. § 2412 (expressly exempting certain actions taken under the Export Regulation subchapter of the War and National Defense Act from 5 U.S.C. §§ 551, 553-559 of the APA and from the APA's judicial review sections (5 U.S.C. §§ 701-706)). See also Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 791 (1958) ("The right to judicial review is too basic a protection. It is not too great a burden upon Congress to require it to speak to the issue.").

executive branch has exceeded the scope of delegated authority or has violated specific constitutional provisions. See *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence"); *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958). As set forth below, each of Petitioners' arguments to the contrary fail to rebut the strong presumption of judicial review.

A. National Security And Military Policy Concerns Do Not Abrogate Judicial Review.

Petitioners argue that the strong presumption in favor of judicial review is inapplicable to the closure of domestic military bases because such decisions involve "sensitive questions of national security and military policy." [Brief at 36-37]. They further contend that courts should not "intrude upon the authority of the executive in military and national affairs." However, the Act was expressly designed to provide a "fair process" for the closure of bases which severely impacted on regional economics and a significant number of *civilian*, not military, employees. 10 U.S.C. § 2687(a); § 2909(c).

Moreover, Congress considered issues of national security when it formulated the exclusive procedure under which domestic military bases are to be closed or realigned. The Act expressly *exempts* from its coverage the closure of a military base "if the President certifies to Congress that such closure . . . must be implemented for reasons of national security or military emergency." 10 U.S.C. § 2687(c). No such certification was made with respect to the Shipyard, which Petitioners concede has been slated for closure pursuant to the Act. Petitioners thus err in arguing that the "national security" concerns implicated by the closure of military installations should be construed to eliminate the strong presumption of

judicial review. *See also* *Vogelaar v. United States*, 665 F. Supp. 1295, 1303-04 (E.D. Mich. 1987).

Petitioners' reliance on *Department of Navy v. Egan*, 484 U.S. 518 (1988), is equally misplaced. *Egan* involved the Navy's refusal to grant a security clearance to a civilian employee working at a Trident nuclear submarine base. Concluding that the Navy's denial was not subject to review, the Court found that the "sensitive and inherently discretionary judgment call" that must be made on each request for a security clearance was "committed by law to the appropriate agency of the executive branch." In reaching that conclusion, the Court expressly noted that the President's broad discretion regarding access to information bearing on national security flowed from his constitutional powers as commander and chief and "exist[ed] quite apart from any explicit congressional grant." *Id.* at 527.

In contrast to *Egan*, Petitioners expressly disclaim any authority for their actions other than that granted to them by Congress under the Act. [Brief at 33]. Moreover, it is well established that the mere involvement of issues affecting the military does not immunize executive branch conduct from review. In fact, judicial review has been found particularly appropriate when, as here, "the actions of the military affect the domestic population during peacetime." *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

B. Judicial Review Is Consistent With The Timetables And Objectives Of The Act.

Petitioners suggest that "[b]y allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove [an indivisible] package of base closures, the Third Circuit has struck at the heart of the carefully balanced statutory mechanism enacted by Congress." As support for that position, they refer to the Act's "rigid series of deadlines and time limits" without a single reference to the Act's "fair process" mandate. [Brief at 42]. That argument, however, contains the seed of its own destruction, for without judicial review the executive branch could

simply ignore the Act's procedural timetable, just as it here ignored the Act's procedural "fair process."

Could the Secretary attempt to initiate a base closure round in 1994 – a year not provided for in the statute? Could the President attempt to submit a base closure package to Congress thirty days (instead of 15 days) after he received it from the Commission, and then direct his Secretary of Defense to begin closing military bases after Congress was unable to muster the votes for a resolution of disapproval? Could Congress disapprove a closure package 90 days (instead of 45 days) after its receipt from the President? Would any base closure package tainted by such procedural defects properly be enjoined by a federal court?²⁵ Taking Petitioners' fundamental argument to its logical conclusion, the answer to all of the foregoing questions would be a clear "No."

Petitioners' argument flies in the face of the paramount fact that the declared *purpose* of the Act is to ensure the *procedural integrity* of the base closure process. Understanding "the importance of public confidence in the integrity of the decision making process," Congress mandated a number of critical procedural safeguards, not one of which had appeared in prior legislation. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) (Congress designed the procedural safeguards of the 1990 Act to allay continuing "suspicions about the integrity of the base closure selection process").

²⁵ Petitioners' own Brief concedes that: (1) the Secretary: a) "must submit a six-year force structure plan", b) "must establish . . . selection criteria for base closure recommendations" and c) "must prepare base closure recommendations"; (2) the Commission: a) "is charged with" holding public hearings, b) preparing a single package of recommendations and c) "must" forward a single indivisible package of base closures to the President by July 1; (3) the President "must" approve or disapprove the entire package within 15 days; and (4) Congress *must* disapprove the entire package – if at all – within 45 days. [See, e.g., Brief at 5-6, 16]. See § 2904(b) (Secretary may not carry out any closure or realignment if Congress enacts joint resolution disapproving Commission's base closure package within 45 days of receipt from President).

The express purpose of these safeguards was to ensure that the Commission, the President and Congress each received "balanced and informed advice" in the course of their statutory duties. Considering the genesis, purpose and nature of this procedurally-oriented statute, if quick closures were the only goal, the 1990 Act would have been totally unnecessary. Indeed, as recognized by the Third Circuit, there is:

little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decision-making process and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time consuming; bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental action involving far greater exigency.

971 F.2d at 948 (citations omitted).

C. Limited And Ambiguous References In The Legislative History To The Scope Of APA Review Do Not Reflect Congressional Intent To Preclude Judicial Review.

Petitioners further suggest that the Act's legislative history reflects a congressional intent to preclude review. That argument, however, rests on a strained misreading of an ambiguous excerpt from the Act's Conference Report and does not constitute "clear and convincing" evidence of an intent to deny judicial review.²⁶ The Conference Report states:

²⁶ To begin with, one never gets to the legislative history to destroy the expressed purpose of an unambiguous statute. See *Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992) (clarity of statutory language obviates

The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) contain explicit exemptions for 'the conduct of military or foreign affairs functions.' An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the Administrative Procedure Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), the decision of the President under section 2803(e), and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("H.R. Conf. Rep. 101-923").

Even if it were appropriate to review this legislative history, given the clear and unambiguous expression of Congressional intent in the Act's "fair process" mandate, the Conference Report reflects, at most, that in carrying out their

need for inquiry into legislative history); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("best evidence" of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President").

statutory duties under the Act, the Secretary of Defense and the Commission were to be exempt from the rulemaking and adjudication provisions of *Chapter 5* of the APA (5 U.S.C. §§ 553, 554, 556 and 557). This limitation, however, is entirely separate and distinct from the review sought here under *Chapter 7* of the APA.²⁷ A broad right to judicial review of agency action is provided by Chapter 7 to determine, *inter alia*, whether Petitioners' actions were "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).²⁸

Moreover, the quote from the Conference Report does not reflect congressional intent to preclude judicial review of the *integrity* of the process. The Report's list of "[s]pecific

²⁷ Chapter 5 of the APA, which establishes procedures for agency rulemaking and adjudication (5 U.S.C. §§ 553 and 554), is entirely separate and distinct from Chapter 7 of the APA, which grants a broad right to judicial review of agency action by aggrieved persons (5 U.S.C. §§ 701 *et seq.*), and does not contain equivalent limitations. Petitioners disregard the fact that agency action may be exempt from the APA's special procedural requirements for agency rulemaking (§ 553) and agency adjudication (§§ 553 and 554) on any of several independent grounds, but nonetheless remain subject to the entire spectrum of judicial review under Chapter 7, e.g., to determine whether agency action was "without observance of procedure required by law," or was "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2). See, e.g., *Common Cause v. Dept. of Energy*, 702 F.2d 245, 249 n.30 (D.C. Cir. 1983).

²⁸ One important illustration of the distinction between these two sets of provisions is that, as set forth in Petitioners' Brief, the rulemaking and adjudication provisions contained in Chapter 5 of the APA expressly do *not* apply to "the conduct of military or foreign affairs functions." 5 U.S.C. §§ 553 and 554. However, the right to judicial review found in Chapter 7 is *not* subject to this exception, but rather has its own exceptions, which apply only to Chapter 7 of the APA. Accordingly, a particular agency action may be exempt from the rulemaking and adjudication procedural requirements of the APA as being a military function, but nevertheless be subject to judicial review under section 702 of the APA for adherence to constitutional, statutory and procedural requirements. See, e.g., *International Assoc. of Machinists and Aerospace Workers v. Secretary of the Navy*, 915 F.2d 727 (D.C. Cir. 1990).

actions which would not be subject to judicial review" *omits the actions of the Commission* itself in preparing the base closure package. That omission is highly relevant since the Commission has the dominant role in the base closure process. Plainly, that omission was not an oversight, and demonstrates that the actions of the Commission itself were intended to be subject to judicial review for compliance with the Act's mandatory procedures. Thus, the legislative history on which Petitioners so heavily rely does *not* provide "clear and convincing evidence" necessary to abrogate the Act's unambiguously declared purpose to ensure a "fair process" and, at the very least, leaves "substantial doubt" that Congress intended to preclude all judicial review. Thus, the "general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

D. The Act's Limitation On Review Of NEPA Claims Is Not Evidence Of Congressional Intent To Abrogate Judicial Review Of The Claims In This Case.

Petitioners contend that the Act's express limitations on review under NEPA (the National Environmental Policy Act of 1969), reflect a congressional intent to preclude all other forms of judicial review.²⁹ [Brief at 43-44]. That argument was decisively rejected by the Third Circuit:

²⁹ NEPA is a "disclosure" statute requiring federal agencies to include an Environmental Impact Statement "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Congress recognized that NEPA litigation had been used "to delay and ultimately frustrate base closure." H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988) at 23. The Act therefore only requires the Department of Defense to comply with NEPA's disclosure mandates "during the process of relocating functions from a military installation being closed or realigned to another military installation . . ." 10 U.S.C. § 2905(c)(2)(A). The Act limits NEPA review by requiring that any action to enforce the statute's disclosure requirements be brought within 60 days of the alleged violation. 10 U.S.C. § 2905(c)(3). Thus, without eliminating

Defendants point out that NEPA claims have been used to delay earlier base closures; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, '[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute.' *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977). In short, we conclude that § 2905(c) does not constitute clear evidence of congressional intent with respect to all judicial review under the Act.

971 F.2d at 948. See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent") (quoting Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 771 (1958)).

The foregoing conclusion is consistent with the maxim of statutory construction: *unius est exclusio alterius*, which dictates that a specific statutory exclusion should be construed to exclude *only* that which is specifically excluded. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) ("enactment of a provision defining the preemptive reach of a

NEPA's important goals, Congress simply limited NEPA challenges to a 60-day window.

statute implies that matters beyond that reach are not pre-empted"). Because Congress expressly limited only *one* specific form of procedural challenge to the base closure process, it should be presumed that Congress (with knowledge of this Court's holdings that judicial review is presumed unless there is clear and convincing evidence to the contrary) did *not* intend to prohibit other forms of review – particularly the review of claims concerning the procedural fairness and integrity of the base closure process itself.

E. By Joint Resolution Congress Confirmed That The Legislative Veto Provision Was Not Intended As A Substitute For Judicial Review.

Petitioners suggest that evidence of congressional intent to eliminate all judicial review may be discerned from the Act's "legislative veto" provision and stretch even further and claim that the integrity of the Act "quite explicitly relies on oversight by Congress to see that the law is observed." [Brief at 48]. This argument is totally contradicted by the structure and declared purpose of the Act. Congress not only has a maximum of only 45 days to pass a joint resolution disapproving the base closure package in its entirety, but any debate on such resolution is limited to a scant *two hours*, to be "divided equally between those favoring and those opposing the resolution." § 2687(d)(2). This is hardly clear and convincing evidence that Congress intended to assume responsibility for assuring the procedural integrity of the base closure process.³⁰

³⁰ Indeed, accepting *arguendo* Petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. for Cert. at 5), the President would have veto power to decide base closures. Such a veto would be virtually impossible to override in the limited time and circumstances provided for Congress to act. If Congress had intended to give the President unilateral authority to close bases, the Base Closure Act would have been unnecessary.

Even if there were any lingering doubt on the issue, Congress in fact passed a joint resolution expressly confirming that its legislative veto power was *not* intended to supplant judicial review of "fair process":

It is the sense of . . . [Congress] that in acting on the Joint Resolution of Disapproval of the 1991 Base Closure Commission's recommendations, the Congress takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the Resolution of Disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base [Closure] and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

S. Res. 1216, 102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13781-13811. See also *Kennedy for President Committee v. Federal Election Comm.*, 734 F.2d 1558, 1563 n.7 (D.C. Cir. 1984) ("we do not believe that the simple existence of a legislative veto provision should immunize an agency from challenges that its action oversteps its statutory authority"). Accordingly, judicial review of the procedural integrity of the base closure process manifestly remains the province of the federal judiciary.³¹

³¹ Petitioners also attempt to insulate their conduct from judicial review by arguing that there is no adequate remedy for their egregious misconduct. However, the Shipyard could simply be removed from the 1991 closure list.

III. THE BASE CLOSURE ACT WOULD BE UNCONSTITUTIONAL IF READ TO PRECLUDE ALL FORMS OF JUDICIAL REVIEW.

If the Act were construed to abrogate all forms of judicial review, including constitutional claims, two constitutional questions would arise: (1) would the Act unconstitutionally delegate legislative power to the executive branch? and (2) would the Act unconstitutionally abrogate the power of the federal judiciary to review constitutional claims? See, e.g., *United States v. Nixon*, 418 U.S. 683, 705 (1974) ("We . . . reaffirm that it is the province and duty of this Court 'to say what the law is' . . ."). To avoid both questions, this Court should affirm the decision below. See *Concrete Pipe & Products of California, Inc. v. Const. Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2283 (1993) ("if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"). This Court's reluctance to address constitutional issues unnecessarily is particularly acute where, as here, those issues "concern the relative powers of coordinate branches of government." *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 466 (1989). See also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

A. Without Judicial Review, The Act Would Unconstitutionally Delegate Legislative Power To The Executive Branch.

The doctrine prohibiting Congress from delegating its legislative power "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The

Court has "long . . . insisted that the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another branch." *Id.* at 371-72 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)). As Justice Scalia noted in his dissent in *Mistretta*:

It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

488 U.S. at 415 (Scalia, J., dissenting). As the Court held in the context of a challenge to wartime economic regulation, delegation of legislative power is:

constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.*

American Power & Light Co. v. Securities and Exchange Comm., 329 U.S. 90, 105 (1946) (emphasis added).

Although the doctrine of unconstitutional delegation necessarily is balanced against a recognition that Congress must have the resources and flexibility to perform its legislative function, see, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), Congressional delegation of power is still subject to careful scrutiny. See *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring); *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). The delegation doctrine "ensur[es] that courts charged with reviewing the exercise of legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union*, 448 U.S. at 686. See also

Touby v. United States, 111 S. Ct. 1752, 1758 (1991) (Marshall, J., concurring) ("judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds"). Delegation of legislative power will survive constitutional scrutiny only "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed.'" *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Yakus v. United States*, 321 U.S. 414 (1944)). Thus, judicial review is a critical component of a valid statutory delegation.

As in *American Power & Light*, 329 U.S. at 105, the fate of domestic military bases presents substantial and basic issues of public policy. In the Act, Congress has delegated a great portion of its authority to make base closure decisions to the executive branch (i.e., the Secretary of Defense and the Commission), but *subject* to stringent procedural mandates. A serious constitutional question would therefore arise if the courts were stripped of their historic jurisdiction to review whether the Secretary and the Commission have each complied with the will of Congress by following the mandated procedures. To avoid this constitutional issue, the Act should be read to permit judicial review. See, e.g., *Johnson v. Robinson*, 415 U.S. 361, 367 (1974) ("it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided").

B. Judicial Review Of Constitutional Claims Cannot Be Abrogated.

As concluded below, the question of "whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review." 995 F.2d at 409. Petitioners nonetheless argue that Congress did not intend for there to be judicial review under the Act, even of constitutional issues. However, imparting such broad intent to Congress would raise a serious constitutional issue because

Congress has not and could not place executive branch conduct beyond constitutional scrutiny. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

In *Webster*, a discharged CIA employee brought both APA and constitutional claims against the Agency's Director. In light of the Director's broad statutory authority with respect to employment decisions, the court held the Director's decision to discharge plaintiff was not subject to APA review. Despite significant national security concerns, however, the *Webster* Court concluded that the Act did not – and possibly could not – be construed to preclude review of the former employee's constitutional claims:

In [CIA's] view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robinson*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid 'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

486 U.S. at 603 (emphasis added) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). At a minimum, the issue whether or not the Secretary, the Commission and the President have transgressed the limits of their statutory authority presents a "colorable constitutional claim." As with the issue of unconstitutional delegation, this issue can be avoided by determining that the Act permits review of Respondents' constitutional claims. *See, e.g., A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) (construing statute to authorize judicial

review to avoid constitutional issue raised if statute were construed to prohibit review).³²

³² An association known as "Business Executives for National Security" ("BENS") – two members of which were members of the 1991 base closure commission and defendants in this case – has filed an *amicus* brief supporting reversal of the decision below. Arguing backwards, BENS suggests that congressional intent to eliminate all judicial review under the Act can be discerned from the fact that, as a matter of recent experience, conversion of military installations to civilian use is easier without the threat of judicial intervention and the attendant delays of litigation. Of course, most executive branch decisions could be implemented more simply and more expeditiously without the specter of judicial review. Such a bold statement of bureaucratic absolutism, however, has no place in our constitutional order. *See, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of authority or under an authority not validly conferred"). If expedition had been Congress' only goal in passing the Act, there would have been no need to pass it. The plain language of the Act itself memorializes Congress' goal of ensuring that a "fair process" is employed in closing bases.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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January 5, 1994

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No. 93-289

FILED
FEB 9 1994

CLERK OF THE COURT

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.,
PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents premise much of their brief on the notion that allegations of procedural error by the Defense Base Closure and Realignment Commission and the Secretary of the Navy are fully equivalent to allegations of constitutional error by the President. Respondents acknowledge (Resp. Br. 13-14) that in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this Court held that the nonbinding recommendation of an agency to the President is not "final agency action" reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 704, and that the President is not an "agency" subject to the APA's judicial review provisions. But seizing on the Court's statement that "the President's actions may still be reviewed for constitutionality" (112 S. Ct. at 2776), they contend that when the President "exceeds the scope of his *statutory or constitu-*

tional powers," he automatically violates constitutional principles of separation of powers. Resp. Br. 15 (emphasis added).

That theory—which respondents advance for the first time in this Court (see Gov't Br. 19-20 n.12)—rests on premises that cannot be sustained under the particular provisions of the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. 2687 note (Supp. IV 1992), or under general principles of judicial review prescribed by the APA. First, respondents err in contending (Resp. Br. 20-22) that Congress conditioned the President's discretion to accept or reject the Commission's recommendations upon his verification that they were formulated free of any procedural error. Second, respondents conflate (*id.* at 15-19, 24-25) concepts of constitutional and statutory error, advancing the novel theory that judicial review must always be available to test the President's compliance with a statute. Third, respondents misread (*id.* at 29-32) *Franklin*, by arguing that the Commission's recommendations are "final" even though they are without binding effect unless the President certifies his approval of them to Congress. Finally, respondents fail to acknowledge (*id.* at 32-45) the powerful evidence of Congress's intent to preclude judicial review of base closure decisions.

1. Respondents' theory of judicial review (as reformulated in this Court) rests on the theory that the President acted ultra vires his authority under the 1990 Act by approving the Commission's 1991 base closure recommendations. Echoing the court of appeals' reasoning (Pet. App. 12a), respondents argue (Resp. Br. 20-22) that the Act divests the President of authority to approve the Commission's recommendations if the Secretary of Defense or the Commission failed to comply with any of the Act's procedural requirements.

As we have explained (Gov't Br. 26-28), that contention reflects a misapprehension of the scheme adopted by Congress. Respondents point to no provision of the 1990 Act that limits the President's discretion to accept or reject the Com-

mission's recommendations. The provision setting forth the President's powers and responsibilities merely provides that the President "shall, by no later than July 15 * * *, transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations." § 2903(e)(1). Nowhere in that provision, or in any other provision of the Act, has Congress limited the President's facially unqualified authority to "approv[e] or disapprov[e]" the Commission's recommendations. As Judge Alito explained in his dissent below, nothing in the 1990 Act suggests either "that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process," or "that [he] must reject the Commission's package of recommendations if such procedural violations come to his attention." Pet. App. 23a.

Respondents' contrary view simply cannot be squared with the court of appeals' determination that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a. Nor can it be reconciled with respondents' own assertion (Resp. Br. 30) that the 1990 Act "does not give the President either the time or the resources to determine whether [the Secretary and the Commission] complied with the Act's procedural mandates" (footnote omitted). Under respondents' reading of the 1990 Act, Congress denied the President the ability to determine the existence of procedural errors, while stripping him of authority to act unless he does so.¹

¹ Respondents argue (Resp. Br. 21) that the President "receives nothing from the Commission upon which he has statutory authority to act" if the Secretary or the Commission committed a procedural error concerning a single base. Under that interpretation, because the President must accept or reject all of the proposed closures as a single package (§ 2903(e)(2) and (4)), any procedural violation could preclude the entire round of base

2. More fundamentally, respondents' position in this Court rests on the supposition that every agency violation of a non-discretionary procedural requirement renders its ultimate decision *ultra vires*—and, indeed, unconstitutional. See Resp. Br. 23. That argument errs in two respects.

a. First, as we explain in our opening brief (Gov't Br. 24-26), an official does not act *ultra vires* simply by committing an error in implementing his authority; rather, *ultra vires* conduct occurs only if an official acts on a matter as to which he lacks authority "to make a decision at all." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.12 (1949). This Court has explicitly rejected the view that "every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986); see also *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 506-507 (1993); *United States v. Montalvo-Murillo*, 495 U.S. 711, 717-719 (1990); Gov't Br. 29-30. Where a statute does not specify that a procedural error disables an official from acting, that consequence should not be implied. *Montalvo-Murillo*, 495 U.S. at 717; *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872); *Good Real Property*, 114 S. Ct. at 506.² Nothing in the 1990 Act specifies or

closures. Nothing in the 1990 Act's text or legislative history suggests that Congress intended that anomalous result.

² That conclusion is supported by the D.C. Circuit's decision in *American Airlines, Inc. v. CAB*, 348 F.2d 349 (1965) (Burger, J.), a case on which respondents heavily rely (Resp. Br. 22-23). Under the statute at issue there, the Civil Aeronautics Board (CAB) issued orders recommending overseas air transportation certificates to the President, who had discretion to approve or disapprove them. *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948). In *Waterman*, this Court held that the CAB's orders were not ripe for judicial review until the President had approved them, and that the President's decision to approve such orders was unreviewable. *Id.* at 114. In *American Airlines*, the D.C. Circuit held

even suggests that the Secretary or the Commission, much less the President, is disabled from acting if there has been any form of procedural error at any step in the process.

b. Second, even assuming that procedural violations on the part of the Secretary and the Commission would amount to *ultra vires* conduct, respondents have failed to state a claim that the President violated the Constitution by approving the Commission's recommendations. See Gov't Br. 30-31. *Franklin's* recognition of the availability of judicial review for constitutional claims is therefore inapplicable here.³

that judicial review was nevertheless available where the complainant alleged that the Board had made a recommendation in excess of its statutory authority. 348 F.2d at 352-353.

For two reasons, *American Airlines* does not assist respondents here. First, the statute under which the CAB issued orders explicitly contemplated that such orders would be subject to judicial review, and *Waterman* adopted an implied exception to that provision for matters involving the President's discretion. 333 U.S. at 106. In contrast, the 1990 Act contains no provision authorizing judicial review of the Commission's recommendations, and *Franklin* establishes that those recommendations do not constitute "final agency action" (5 U.S.C. 704) subject to review under the APA. Second, *American Airlines* explicitly distinguished claims of *ultra vires* conduct from claims of procedural error, holding that the latter were unreviewable because they merely "go to the correctness of the award." 348 F.2d at 352; see *id.* at 353 (no jurisdiction of "an attack on the [agency's] procedures in making and rendering its decision") (citing *United States Overseas Airlines, Inc. v. CAB*, 222 F.2d 303 (D.C. Cir. 1955)).

³ Contrary to respondents' contention (Resp. Br. 20 n.20), *Franklin* considered the constitutional issue in the context of a claim against the Secretary of the Commerce, not the President. 112 S. Ct. at 2767. Respondents similarly allege that procedural errors were committed by the Secretary of Defense and the Commission. But an agency's violation of procedural requirements does not in itself violate the Constitution; only where the procedures were themselves required by the Constitution does a violation raise a constitutional question. See, e.g., *United States v. Caceres*, 440 U.S. 741, 751-752 (1979). There is no basis for a different rule where the dispositive action is by the President himself, rather than by a subordinate of-

Respondents argue (Resp. Br. 24-25) that judicial review of the President's compliance with the law is a form of constitutional review under the separation-of-powers doctrine. Under respondents' view, all claims that an Executive official exceeded his statutory authority would be reviewable as constitutional claims outside the confines of the APA. The cases on which respondents rely, however, have not equated statutory claims with constitutional claims. Rather, they have involved either independently cognizable constitutional rights or allegations that ultra vires conduct stripped a government officer of immunity from personal liability for the wrongful invasion of rights protected at common law.

For example, respondents rely heavily (Resp. Br. 14-15) on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which approved injunctive relief against the Secretary of Commerce to prevent seizure of the Nation's steel mills pursuant to a Presidential order. *Youngstown*, however, does not hold that whenever the President exceeds his statutory authority, he violates the Constitution. See Gov't Br. 32-34. Because the government in *Youngstown* disclaimed any reliance on statutory authority and asserted inherent constitutional power to seize the mills, the sole question was whether the President's order was within his constitutional authority. 343 U.S. at 584, 587-588. Moreover, the plaintiff steel mill owners alleged that the President had invaded their property rights, which were independently protected by the common law and the Fifth Amendment. Here, by contrast, respondents—elected officials and shipyard workers—have no personal rights protected by either the Constitution or the common law with respect to base closures.

ficial. It could not plausibly be contended that the 1990 Act's procedures for closing military bases are required by the Constitution or that a violation of those procedures violates the Constitution.

Similarly, respondents err (Resp. Br. 15) in reading *Franklin* for the broad principle that judicial review is necessarily available "where the President exceeds the scope of his *statutory or constitutional powers*" (emphasis added). While the plaintiffs in that case raised a statutory claim under the Census Act (see Gov't Br. 21 n.13), this Court confined its review to their distinct claim directly under the Census Clause of the Constitution, Art. I, § 2, Cl. 3. See 112 S. Ct. at 2777-2779. Hence, *Franklin* offers no support for respondents' position that allegations of conduct in excess of statutory authority automatically require judicial review.

Finally, respondents misread (Resp. Br. 15, 18, 25) cases in which plaintiffs alleged ultra vires conduct as a means of stripping government officers of immunity from suits alleging the invasion of protected common law rights. Thus, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), this Court sustained an award of damages for a "plain trespass" (*id.* at 178) that had occurred when a United States naval officer seized a neutral vessel. The officer raised as a defense a Presidential order authorizing the seizure, but this Court held that the President's order was unauthorized by the relevant statute and therefore could not "legalize" the seizure. *Ibid.* Thus, *Little v. Barreme* at most establishes that when a federal court has jurisdiction to hear a common law claim, it may review the statutory basis for a Presidential order that is asserted as a defense. It does not stand for the distinct proposition that the Constitution intrinsically provides a cause of action for federal conduct in excess of statutory authority.⁴

⁴ Other cases relied on by respondents (Resp. Br. 25) are of similar import. Thus, *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912), was an action to enjoin a federal officer from invading the property rights of the plaintiff. The question of ultra vires conduct arose because federal sovereign immunity "does not protect * * * officers from personal liability to persons whose rights they have wrongfully invaded," and the question of wrongfulness turned on whether the officer was "acting in excess of his authority or

Of course, the allegation that a federal officer has exceeded his statutory authority may itself give rise to a judicially cognizable claim for relief, but only if Congress has created an appropriate cause of action.⁵ Respondents argue (Resp. Br. 24-25), however, that judicial review is required for both statutory and constitutional claims against the President. That contention is misplaced. First, *Franklin* explicitly distinguished constitutional claims from nonconstitutional claims. See 112 S. Ct. at 2776. Second, in *Davis v. Passman*, 442 U.S. 228, 241 (1979), this Court recognized that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is

under an authority not validly conferred." *Id.* at 619-620; see also *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (where post office official withholds mail without statutory authority, "he thereby violates the property rights of the person whose letters are withheld"); *Dames & Moore v. Regan*, 453 U.S. 654, 667, 672 n.5, 688-690 (1981) (challenge to Treasury regulations and Executive Orders alleged to have invaded property interests in final judgments and attachments). Moreover, in *Dakota Central Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163 (1919), cited by amicus Public Citizen (Pub. Cit. Br. 16), this Court considered whether the President was acting within his authority in taking over a state telephone system during war time. That issue arose in a lawsuit seeking to enforce state-imposed rates against the telephone company, and the question of ultra vires conduct arose because the company defended its noncompliance with state rates by asserting that the federal government had validly taken control of its operations. 250 U.S. at 180-187.

⁵ By contrast, the controversy in this case turns exclusively on whether the 1990 Act authorizes the closure of the Philadelphia Naval Shipyard, and the court of appeals explicitly determined (Pét. App. 69a) that respondents lack any property interest in the Shipyard's continued operation. Although respondents imply (Resp. Br. 26) that our position in this case would make separation-of-powers claims nonjusticiable, we have argued merely that respondents have failed to identify any cause of action relating to the separation of powers, but rely on the naked assertion that the President has acted in excess of his *statutory* authority.

protected by the Constitution." The Court explained (*id.* at 241-242 (citations omitted)):

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner.

* * * * *

[In contrast,] [a]t least in the absence of a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

When a party wishes to sue a federal agency for exceeding its statutory powers, a cause of action is typically afforded by the judicial review provisions of the APA,⁶ provided that the statutory prerequisites to suit are met. The APA's judicial review provisions, however, apply to "final agency action" (5 U.S.C. 704), and *Franklin* clearly establishes that the President is not an "agency" for purposes of the APA. 112 S. Ct. at 2775-2776. Consequently, when a plaintiff pursues a statutory challenge to a decision by the President, he must identify some other statutory source for his right of action.⁷ Here,

⁶ The APA authorizes judicial review of the claim that an agency acted "in excess of statutory * * * authority." 5 U.S.C. 706(2)(C).

⁷ In *Carl Zeiss, Inc. v. United States*, 76 F.2d 412 (C.C.P.A. 1935) (Resp. Br. 21-22), the Court of Customs and Patent Appeals held that the President had no authority to issue a tariff proclamation under the Tariff Act of 1930

respondents have not claimed that any statute other than the APA provides authority for their suit. Moreover, as we explain below (see pp. 14-20, *infra*), the text, structure, and history of the 1990 Act show that it precludes judicial review of base closure decisions.⁸

3. Respondents contend (Resp. Br. 29-30) that the Commission's recommendations themselves constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. They argue (Resp. Br. 29) that the 1990 Act does not allow the President to "ignore, revise or amend" the Commission's report, but instead "only" permits him to approve or reject the report in its entirety. That feature of the Act is irrelevant to the finality issue, because it does not alter the consideration deemed crucial in *Franklin*: that the Commission's report "has no direct effect" until "the President takes affirmative steps" to approve the report and certifies his approval to Congress. 112 S. Ct. at 2774. The fact that the President may only accept or reject the report as a whole does not render it "final" for APA purposes; in fact, in evaluating the census scheme at issue in

in the absence of an adequate prior notice by the Tariff Commission. Although the Tariff Commission, like the Base Closure Commission, merely issued recommendations for the President's approval, the Tariff Act, unlike the 1990 Act, explicitly authorized judicial review of all orders underlying a customs assessment. See 19 U.S.C. 1515 (1958).

⁸ Relying on *Leedom v. Kyne*, 358 U.S. 184 (1958), respondents also argue (Resp. Br. 27) that there is general authority (aside from the APA) for courts to review claims of ultra vires governmental conduct. But this Court has explicitly rejected the notion that *Leedom* "authoriz[es] judicial review of any agency action that is alleged to have exceeded the agency's statutory authority." *Board of Governors v. MCorp Financial, Inc.*, 112 S. Ct. 459, 465 (1991). Rather, *Leedom* "stands for the familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 466 (internal quotation marks omitted). *Leedom* therefore addresses whether Congress has precluded review; it does not suggest that judicial review must always be available for claims of statutory violation.

Franklin, this Court expressly rejected the argument that the census report of the Secretary of Commerce was "final" because of the "admittedly ministerial nature of the apportionment calculation" made by the President prior to transmitting the census report to Congress. *Id.* at 2775. Here, of course, the approval by the President, as Commander-in-Chief, of the closure of a number of military bases is scarcely ministerial. In any event, what is crucial, for purposes of finality under the APA, is that only "the President's personal transmittal of the report to Congress" can "settle[]" (*ibid.*) the matter of base closure.

Amicus Public Citizen argues that the actions of the Secretary, as well as those of the Commission, constitute "final agency action." In particular, it urges (Pub. Cit. Br. 7-10) that a contrary conclusion would contravene the APA's strong presumption in favor of reviewability of agency action. This Court, however, typically invokes the presumption of reviewability when it is evaluating the contention that in a particular statutory scheme, Congress intended to preclude review of agency action that is otherwise reviewable. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-673 (1986); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-141 (1967). Application of that presumption presupposes the existence of reviewable "final agency action" (see, e.g., *Abbott Laboratories*, 387 U.S. at 140 ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress")) (emphasis added)); this Court has never held that the APA's presumption of reviewability excuses the absence of finality or other explicit prerequisites of judicial review under the APA itself.

Public Citizen also argues (Pub. Cit. Br. 14) that the finality requirement of the APA is designed exclusively to avoid premature interference with agency decisionmaking processes, and that finality attaches whenever an agency "has

taken all the steps it must take to finalize its decision with respect to the particular action that is challenged."⁹ That contention, however, is foreclosed by *Franklin*, which held that APA review of the census report prepared by the Secretary of Commerce was unavailable even though the Secretary's role in the reapportionment process had been completed. 112 S. Ct. at 2773-2776.¹⁰ As the Court in *Franklin* made clear, the existence of "final agency action" turns not only upon "whether the agency has completed its decision-making process," but also upon "whether the result of that

⁹ Public Citizen argues (Pub. Cit. Br. 14-15) that procedural claims become ripe for review as soon as the agency omits to take an action required by statute. That contention, however, misapprehends the APA's distinct cause of action to compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). Section 706(1) addresses circumstances in which the agency has wrongfully failed to act; it does not transform every alleged failure to comply with a procedural requirement of a statute into "final agency action" subject to immediate review. In fact, the APA explicitly contemplates that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704 (emphasis added). In other words, a procedural action by an agency merges into—and is reviewable only as an aspect of—the "final agency action." Where, as here, there is no "final agency action" that is subject to judicial review, the antecedent procedural action remains unreviewable as well. Thus, far from treating procedural actions as inherently "final," the APA explicitly distinguishes such actions from "final agency action."

¹⁰ In trying to recast the "final agency action" requirement as a ripeness requirement, Public Citizen argues (Pub. Cit. Br. 21) that *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), rather than *Franklin*, supplies the "correct approach" to judicial review of procedural claims. Although *Defenders of Wildlife* establishes that a litigant may challenge procedural errors without showing that the errors affected the substantive agency action (*id.* at 2142-2143 n.7), that ruling deals with Article III standing, not "final agency action" under 5 U.S.C. 704. In *Defenders of Wildlife*, the plaintiffs challenged an agency rule, which of course was "final agency action," even though the plaintiffs did not have standing to challenge it.

process is one that will directly affect the parties." *Id.* at 2773. Public Citizen's test for finality wholly ignores the second element of "final agency action" prescribed by *Franklin*.¹¹

¹¹ Public Citizen also maintains (Pub. Cit. Br. 24-25) that our view of the APA's finality requirement would preclude judicial review of compliance with statutes such as the Freedom of Information Act, 5 U.S.C. 552, and the Government in the Sunshine Act, 5 U.S.C. 552b. Both statutes, however, explicitly provide for judicial review to ensure agency compliance (see 5 U.S.C. 552(a)(4)(B), 552b(h)(1)), and the APA authorizes judicial review of "final agency action" or "[a]gency action made reviewable by statute." Public Citizen similarly points (Pub. Cit. Br. 24) to the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*, and contends that under *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), a failure to comply with FACA results in final agency action at the moment of the omission. To be sure, this Court in *Public Citizen* reviewed the question whether the Department of Justice must comply with FACA in recommending judicial nominees to the President. Even assuming that the applicability of FACA, *vel non*, is reviewable under the APA's provision authorizing judicial review to compel "agency action unlawfully withheld" (5 U.S.C. 706(1)), failure to comply with FACA does not invalidate the end result of the agency process to which the advisory committee was to contribute. See *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979) (Friendly, J.). Thus, even if FACA provided an appropriate analogy to the very different scheme of the 1990 Act, respondents would not be entitled to invalidate the base closure decision in this case.

Finally, Public Citizen contends (Pub. Cit. Br. 25-28) that our approach to finality would foreclose judicial review of claims under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332, relating to an agency's proposal of legislation. Because NEPA does not itself create a private right of action, judicial review of compliance with NEPA must rest on the APA, and the availability of judicial review therefore presumably turns on the existence of "final agency action." *Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993), cert. denied, No. 93-560 (Jan. 10, 1994). Public Citizen argues (Pub. Cit. Br. 26), that if that understanding of finality were correct, Congress would have had no reason to exempt the base closure process from NEPA because judicial review of NEPA claims relating to the base selection process would have been

4. Respondents argue (Resp. Br. 32-44) that Congress did not intend to preclude judicial review of the base selection decision under the 1990 Act. They emphasize (*id.* at 3, 27-28, 35) that an explicit purpose of the 1990 Act is to provide a "fair process" for base closures (§ 2901(b)), and suggest that that objective compels the availability of judicial review. Respondents, however, conspicuously neglect the remainder of the single purpose described in the very same subsection: to provide "a fair process *that will result in the timely closure and realignment of military installations.*" § 2901(b) (emphasis added). As we explain in our opening brief (Gov't Br. 38-48), the structure, purpose, and history of the 1990 Act confirm that judicial review of the selection of bases for closure is incompatible with the latter objective.

a. We disagree with respondents' contention (Resp. Br. 35-36) that the usual presumption of reviewability applies under the 1990 Act because Congress has authorized the President to close a base outside the prescribed process if he "certifies to the Congress that such closure * * * must be implemented for reasons of national security or a military emergency." 10 U.S.C. 2687(c); § 2909(c)(2). The fact that Congress has given the President extraordinary authority to close a particular base for national security reasons in no way eliminates national security considerations from the overall statutory process of selecting bases for closure. A number of provisions of the 1990 Act call for consideration of sensitive questions of military policy in selecting bases for closure (see Gov't Br. 37), and the Act inevitably calls for the exercise of

unavailable on finality grounds. NEPA, however, imposes procedural requirements on federal agencies; it does not address the subject of judicial review. The 1990 Act accordingly exempts the President, the Commission and the Secretary from complying with NEPA in the base selection process; it does not, as Public Citizen assumes, require compliance with NEPA and merely foreclose judicial review of that compliance.

"the discretion of the Commander-in-Chief concerning the domestic deployment of the [N]ation's military resources." Pet. App. 46a. Thus, the APA's presumption of reviewability is inapposite because of the inevitable role of national security considerations in the determination of base closures. See, *e.g.*, *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

b. Even if the presumption of reviewability were applicable, moreover, the 1990 Act contains "reliable indicator[s]" (*Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984)) of congressional intent to preclude judicial review. In our opening brief (Gov't Br. 38-45), we demonstrate that judicial intervention in the selection of bases for closure would defeat the 1990 Act's purposes of avoiding political maneuvering and ensuring expedition and finality in the process of selecting bases for closure. Respondents do not even attempt to dispute our showing (Gov't Br. 40-41) that judicial review would undermine Congress's decision to give the President and Congress direct responsibility for the base closure decision and require them to act on an indivisible package of base closures that must stand or fall together.

Respondents err in suggesting (Resp. Br. 38) that judicial review would not compromise the 1990 Act's purpose of timeliness and expedition, and that those values would be preserved as long as judicial review is withheld until completion of the base selection process. As demonstrated in our opening brief (Gov't Br. 44-45), the 1990 Act places a firm premium on implementation and expedition after the President and Congress have acted. Section 2904(a) mandates that the Secretary "shall" close all bases identified in the report transmitted by the President to Congress pursuant to Section 2903(e), and Congress imposed a 60-day limitations period for actions brought under NEPA to challenge the post-selection implementation of the base closure decisions. See § 2905(c)(3). If Congress had intended to permit post-selection procedural challenges to base closure decisions, it surely would have im-

posed a comparable limitation; otherwise the period for such challenges would be open-ended. The absence of such a limitation thus further manifests an intent to preclude review. Pet. App. 80a-81a n.16 (Alito, J., concurring in part and dissenting in part).

c. Respondents further contend (Resp. Br. 3, 11, 31) that the absence of judicial review would effectively eviscerate any procedural safeguards built into the 1990 Act. That argument, however, presupposes that statutory requirements will not be observed unless they are judicially enforceable. That premise is contrary to the principle that "the official acts of public officers" are supported by a "presumption of regularity." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14 (1926); see *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Executive officers must, and are presumed to, observe statutory requirements regardless of their enforceability in court.¹² That presumption of regularity is reinforced here by the fact that the ultimate decision to close bases is vested in the President, a "constitutional officer," *Franklin*, 112 S. Ct. at 2775, who is uniquely accountable for his actions.

In addition, the 1990 Act contemplates that Congress will have a substantial oversight role in the base closure process, thereby helping to ensure compliance by those involved in the

¹² Respondents argue (Resp. Br. 1, 7-8) that petitioners provided inadequate documentation of the base closure decision to the Government Accounting Office (GAO) and held closed meetings in violation of the 1990 Act. In opposing respondents' motion for a preliminary injunction, petitioners explained that after the GAO initially requested fuller documentation of the Navy's base closure decisionmaking process, that documentation was provided. Gov't D. Ct. Opp. to Prelim. Inj. 38-41. Petitioners also explained that the 1990 Act's requirement of public hearings does not preclude the Commission from obtaining information or conducting deliberations in addition to those provided for in such hearings. *Id.* at 42-45. Indeed, some of the respondent elected officials met with Commission staff outside the context of public hearings. *Id.* at 43-44 & n.19.

formulation of the base closure decisions. Respondents argue (Resp. Br. 43-44) that Congress is in no position to ensure the procedural regularity of the selection process. The 1990 Act, however, adopts a variety of mechanisms designed to facilitate substantial congressional oversight. See Gov't Br. 39. The Act requires participants in the base closure process to consult with Congress and keep it apprised of developments in the formulation of base closure recommendations, see § 2903(a)(2), (b)(2), (c)(1), (c)(2) and (d)(3), and it prescribes streamlined procedures for consideration of a joint resolution of disapproval. §§ 2904(b), 2908. There is no reason to assume that Congress will be unable to use those mechanisms to ensure the procedural integrity of the base closure process.¹³

¹³ We disagree with respondents' suggestion (Resp. Br. 43) that Congress's role is undermined by the fact that the statute contemplates only two hours for floor debate. The 1990 Act also contemplates that the Committees on Armed Services in the House and the Senate will have up to 20 days to conduct hearings on a joint resolution of disapproval. See § 2908(b) and (c); Pet. App. 43a. In addition, the House debate on the joint resolution of disapproval for the 1991 round of base closures explicitly addressed alleged procedural flaws in the selection of the Philadelphia Naval Shipyard. Gov't Br. 40-41 n.29. Thus, it is not beyond Congress's capacity to consider alleged procedural errors in the base closure process as part of the statutory oversight mechanism. Congress simply determined that the alleged procedural defects, whatever their merit, did not warrant a rejection of the base closure package, including the Philadelphia Naval Shipyard. Respondents argue (Resp. Br. 44) that the efficacy of congressional oversight is undermined by "a sense of the Congress" resolution indicating that the failure to pass a joint resolution of disapproval in 1991 did not reflect the conclusion that the Commission and the Department of Defense had complied with all the statutory requirements of the 1990 Act. That resolution, however, does not suggest that Congress lacks the capacity to consider alleged procedural errors in considering a joint resolution of disapproval under the Act. Moreover, the "sense of the Congress" resolution states that Congress's failure in 1991 to enact a joint resolution disapproving the President's report is to be interpreted as "approval of the recommendations issued by the Base Closure Commission." Department of

d. Respondents misapprehend the plain import of the relevant legislative history, asserting (Resp. Br. 39-40) that a key passage in the Conference Report accompanying the 1990 Act indicates only that the base closure process would be exempt from the procedural requirements of Chapter 5 of the APA, and not the judicial review provisions of Chapter 7. The report, however, explicitly states that various actions in the base closure process—specifically “includ[ing]” the “Secretary of Defense’s recommendation,” the “decision of the President” approving the Commission’s recommendations, and “the Secretary’s actions to carry out the recommendations of the Commission”—“would not be subject to the rule-making and adjudication requirements [of the APA] and would not be subject to judicial review.” H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 706 (1990) (emphasis added).

In a related vein, respondents argue (Resp. Br. 40-41) that the Conference Report addresses only judicial review of substantive challenges to the base closing process, not procedural challenges to that process. The Conference Report draws no such distinction; it states without qualification that the actions undertaken during the base closure selection process “would not be subject to judicial review.” H.R. Conf. Rep. No. 923, *supra*, at 706.

The legislative history also strongly indicates that Congress made NEPA inapplicable to the base closure process precisely because it sought to eliminate a source of delays in and ultimate frustration of the closure of domestic military bases. See Gov’t Br. 3, 43-44. Respondents argue (Resp. Br. 34, 42-43), however, that Congress’s explicit exclusion of NEPA claims carries with it the negative implication that

Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8131, 105 Stat. 1208 (emphasis added).

other procedural claims *are* available under the 1990 Act.¹⁴ But Congress did not address the NEPA issue by foreclosing judicial review of NEPA claims. Congress instead rendered NEPA altogether inapplicable in the base closure setting. § 2905(c)(1). Because Section 2905(c)(1) does not take the form of a foreclosure of judicial review, it carries no implication that judicial review is allowed for procedural claims outside the NEPA context. See also Gov’t Br. 43-44.

e. Finally, respondents argue (Resp. Br. 45-48) that if the 1990 Act forecloses judicial review of their procedural claims, the Act is unconstitutional. Respondents claim for the first time that if the 1990 Act precludes judicial review, it would result in an unconstitutional delegation of legislative power. They do not, however, suggest that the 1990 Act fails to provide the participants in the base closure process with an “intelligible principle” to which they must conform—the usual inquiry for purposes of the nondelegation doctrine, *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)—and they ignore that the 1990 Act addresses a subject that is within the President’s inherent constitutional authority as Commander-in-Chief. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). Nor do this Court’s precedents “establish the principle that judicial review is essential to sustain a delegation, since the exercise of many validly delegated authorities is statutorily insulated from judicial review.” *Synar v. United States*, 626 F. Supp. 1374, 1389-1391 (D.D.C.) (per curiam), *aff’d* on other grounds *sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); see *National Federation of Federal Employees v. United States*,

¹⁴ Respondents miscast the 1990 Act’s NEPA provisions, asserting (Resp. Br. 41-42) that “without eliminating NEPA’s important goals, Congress simply limited NEPA challenges to a 60-day window.” The “60-day window” applies only to NEPA claims involving *implementation* of the President’s decision.

905 F.2d 400 (D.C. Cir. 1990) (rejecting nondelegation challenge to prior base closure legislation while holding that base closure decisions are not subject to judicial review). Under respondents' contrary view (Resp. Br. 46-47), every statutory scheme would be unconstitutional to the extent that it precludes judicial review of agency action for purposes of the APA, 5 U.S.C. 701(a).

Further, respondents err in contending (Resp. Br. 46-48) that the preclusion of review raises serious constitutional questions under *Webster v. Doe*, 486 U.S. 592, 603 (1988). Although *Webster* states that any attempt to deny any judicial forum for a colorable constitutional claim would raise a serious constitutional question, that case arose in the context of the assertion of a personal, constitutionally protected interest. Respondents have no constitutionally protected interest in the base closure process, and the Constitution does not require that Congress nevertheless furnish them with a cause of action to challenge the President's decision in that process. In any event, we have explained (pp. 5-10, *supra*) that respondents' procedural challenges to the base closure process in this case are not claims of constitutional magnitude. Even if Congress were unable to preclude judicial review of some constitutional claims, Congress may validly preclude judicial review of compliance with its own enactments. See *Davis v. Passman*, 442 U.S. at 241 ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner.").

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994

DEC -2 1993

No. 93-289

In The
Supreme Court of the United States
October Term, 1993

◆

JOHN H. DALTON, Secretary of the Navy, et al.,
Petitioners,

v.

ARLEN SPECTER, et al.,

Respondents.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

◆

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF FOR BUSINESS EXECUTIVES FOR
NATIONAL SECURITY AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

◆

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

**MOTION FOR LEAVE TO FILE BRIEF OF
BUSINESS EXECUTIVES FOR NATIONAL
SECURITY AS AMICUS CURIAE**

Pursuant to Rule 37.4 of the rules of this Court, Business Executives for National Security ("BENS") respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondents' counsel to provide consent.

BENS is a non-partisan, non-ideological, and non-profit organization of top business leaders from around

the country.¹ BENS' members share a commitment to promote a sound, cost-effective national security policy and to encourage the Defense Department and other agencies to adopt successful business practices in defense planning and management. This common interest has led BENS to become involved in a wide range of defense and security policy debates, including base closure and conversion, force restructure, procurement, management, industrial base, and nonproliferation issues. Founded in 1982, BENS is funded by the individual contributions of members and private foundations. BENS has no corporate members and does not accept government funds.

BENS' primary purpose is to educate citizens and policy makers about how to achieve a more efficient national security structure by employing successful business planning and management techniques. BENS accomplishes its mission by issuing policy papers,² serving as a resource for policy makers and the media, and conducting workshops and other meetings throughout the United States. BENS also acts as a resource for the executive and legislative branches by providing briefings, legislative analysis, and testimony to lawmakers.³

¹ A partial list of members is included at pages 1-10 of the Appendix to the accompanying Brief for *Amicus Curiae*.

² BENS publishes three basic policy products: "Special Reports" (thorough in-depth studies of particular issues); "Issue Briefs" (policy papers that make specific recommendations to the Congress or the President); and "Policy Updates" (short papers designed to convey recent information on specific issues).

³ BENS has testified several times before the Congress on base closure, defense conversion, and other national security issues. See note 6 *infra*.

Recognizing that the government must retain a practical, non-political process for closing unnecessary military bases, BENS has long supported the use of an independent, non-partisan commission to identify, and recommend the closure of, unnecessary military bases. William H. Tremayne, a member of the BENS Board of Directors and the project manager for the Grace Commission,⁴ helped pave the way for a base closing commission when, in 1983, he recommended that "[t]he President should appoint an independent commission to make a comprehensive study of the base realignment problem."⁵ Since then, BENS has worked with both the government and the private sector to create an achievable, fair, and objective system for closing bases,⁶ as embodied in the

⁴ The Office of the Secretary of Defense Task Force of the President's Private Sector Survey on Cost Control in the Federal Government is commonly and hereinafter referred to as the "Grace Commission."

⁵ Grace Commission, *Report on The Office of the Secretary of Defense* 103 (1983).

⁶ Two BENS members, Arthur Levitt, Jr. and Howard H. Callaway, were 1991 Base Closure and Realignment Commissioners. In addition, BENS has provided testimony on base closure to Congress. See, e.g., Military Construction (H.R. 5022) *Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006 and Oversight of Previously Authorized Programs Before the Subcomm. on Military Installations and Facilities of the House Comm. on Armed Service*, 102d Cong., 2d Sess. 528 (1992) (Statement of Robert W. Gaskin, Director of Policy, BENS); Keith Cunningham, Testimony Before the Legislation and National Security Subcommittee of the House Committee on Government Operations (July 14, 1993); Keith Cunningham, Testimony Before the Military Readiness Subcommittee of the Senate Committee on Armed Services (May 20, 1993).

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2901 *et seq.*, 104 Stat. 4739 *et seq.* (1990) (codified at 10 U.S.C. § 2687) (the "1990 Act").

In 1992 BENS began a major study of how the base closure process has actually been working in order to better understand the effect of base closure on affected communities. The initial results of this unique, on-going study were published in April 1993. Keith Cunningham, Business Executives for National Security, *Base Closure and Reuse: 24 Case Studies* (1993) ("BENS Study"). The BENS Study's findings have already been cited many times in the media and used extensively by the current Administration and the Congress to develop community assistance policies.

BENS seeks leave to file a brief *amicus curiae* in this case because, in light of its unique position as the only truly independent organization that has studied the effects of base closures on local communities, it can provide this Court with a useful perspective on how the base closure process as designed by Congress has actually worked. By describing the "real-world" operation of the 1990 Act, BENS' participation as an *amicus curiae* can illuminate for the Court how strikingly this experience has confirmed the judgment of the drafters of the 1990 Act – manifest in its text and legislative history – that the unavoidable closure of unneeded military bases must operate with speed and finality to transform base closure from a disaster for local communities into an economic boon of no mean proportions. Research shows that communities can and do successfully convert military facilities to productive new uses, provided that the complex and interrelated array of public and private decisions

needed to plan, finance and execute a successful conversion is not subject to the uncertainty and delays that necessarily accompany litigation. Because litigation would impede redevelopment efforts and thus harm communities, Congress intended – *sensibly* intended, as the facts have shown – to preclude judicial review of the base closure process.

Accordingly, BENS respectfully requests that its motion for leave to file an *amicus curiae* brief in support of petitioners be granted.

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No. 93-289

In The
Supreme Court of the United States
 October Term, 1993

JOHN H. DALTON, Secretary of the Navy, et al.,
Petitioners,
 v.

ARLEN SPECTER, et al.,
Respondents.

On Writ Of Certiorari
 To The United States Court Of Appeals
 For The Third Circuit

BRIEF FOR BUSINESS EXECUTIVES FOR
 NATIONAL SECURITY AS AMICUS CURIAE
 IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the motion
 accompanying this brief.

SUMMARY OF ARGUMENT

The Defense Base Closure and Realignment Act of
 1990, Pub. L. No. 101-510, § 2901 *et seq.*, 104 Stat. 4739 *et*
seq. (1990) (codified at 10 U.S.C. § 2687) (the "1990 Act")

established an expedited process for closing obsolete military bases largely in order to maximize the potential of affected communities to generate new jobs and income by redeveloping closed bases. Congress recognized that for such efforts to be successful, communities would have to know with certainty that bases selected for closure would actually be closed without undue delay. The actual experience of affected communities has confirmed the wisdom of Congress' judgment, and shows that communities can successfully convert closed bases from military to civilian uses if the major stages of base redevelopment, such as planning, leasing, marketing, and financing, are effectively integrated with the base closure process. That integration can only occur if base closure operates with finality and with some predictability. Because litigation would be at odds with this goal by interjecting delays and uncertainty into the redevelopment process, Congress relied on procedures other than judicial review to ensure the fairness and reasonableness of decisions to close particular bases.

ARGUMENT

I. CONGRESS INTENDED TO ESTABLISH A BASE CLOSURE PROCESS THAT WOULD MINIMIZE POTENTIAL HARM TO COMMUNITIES BY IMPLEMENTING BASE CLOSURE DECISIONS WITH SPEED AND FINALITY.

The base closure process created by the 1990 Act has at its heart the goal of minimizing the harm that communities could suffer from the closure of neighboring military bases.

Indeed, it was the fear of such harm that created the political gridlock which had long prevented Congress from closing any military bases. As Representative Dick Armey, the architect of the Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 101 *et seq.*, 102 Stat. 2623 *et seq.* (1988) (codified at 10 U.S.C. § 2687) ("1988 Act"), which first codified the base closure commission concept upon which the 1990 Act is based, stated on the House floor, "[m]ilitary bases provide jobs to many civilians and the paychecks of their personnel help support local economies. This means that if a base becomes redundant or obsolete, a Member will fight to keep it open as if his political life depends on it." 134 Cong. Rec. H1615 (daily ed. April 13, 1988).¹ It is no exaggeration, therefore, to state that individual legislators felt that their political survival as well as the public interest depended upon their skill in crafting a base closure process that took into account the needs of affected communities.²

¹ Senator William Roth, in discussing what would become the 1988 Act, acknowledged that "[t]he formulators of this initiative are fully aware that some local communities can be negatively impacted by the closure of military facilities." 134 Cong. Rec. S4973 (daily ed. April 27, 1988). Indeed, so great had been this concern in the past that Congress enacted certain provisions in the 1970s "for the express purpose of preventing bases from being closed. . . . [T]hat has been so effective that it has prevented all base closures in the last 10 years." 134 Cong. Rec. H1621 (daily ed. April 13, 1988) (statement of Rep. Armey).

² During the debate on the 1988 Act, Senator John Warner openly acknowledged this sentiment on the Senate floor: "The chairman [of the Senate Armed Services Committee, Senator Sam Nunn] mentioned the apprehension of the Members of Congress, and indeed as we approach our responsibility to vote on this momentarily, I am fearful that some will say 'We are

Without doubt, in crafting the 1988 and 1990 Acts, Congress placed great importance on the ability of communities to reuse closed bases in order to turn the closing of a military base into a boost to the local economy. In introducing the bill that would become the 1988 Act, Representative Armey observed:

There is in my estimation an undocumented concern in many communities that closing the base will result in harm to the community. This has not been true with past base closures. Certainly an economic readjustment is necessary. That is always the case. But in most instances historically where bases have been closed, and the properties have been put to other uses, the communities have gained.

134 Cong. Rec. H1621 (daily ed. April 13, 1988). Representative Armey then cited statistics showing that all but a few communities had experienced a substantial net gain in jobs following base closures, among other benefits. *Id.* Representative Upton likewise stated:

Many people object to base closings because they believe that closing a base would cause an economic depression in the surrounding community. This does not have to be the case. Take,

closing bases and we may close out my career in the Congress of the United States.' " 134 Cong. Rec. S15557 (daily ed. Oct. 12, 1988). Senator Nunn himself stated: "We see the squeeze on Defense funds. We know we cannot afford excess bases that we do not need. We also understand the reality and the sensitivity in the communities of America that are so dependent in some cases on these bases at least in the short run and we know that that reflects itself here in the Congress." 134 Cong. Rec. S15556 (daily ed. Oct. 12, 1988).

for example, a situation in my own State of Michigan, the closing of Kinchloe Air Force Base in 1977. This base provided 700 jobs and \$36 million in annual local revenues. It closed in 1977, but what has happened since? The answer is an economic boom. The county board of commission established a local economic-development corporation to offer low-interest loans and lease the land at low rates. Nearly 30 companies with more than 1,000 jobs established operations on the former base property, and the expansion is continuing. Closing a military base does not mean harming a community's economy.

134 Cong. Rec. H1616 (daily ed. April 13, 1988). In an article published prior to the passage of the 1988 Act, Representative Armey returned to this theme: "[B]ase closing[s] almost never turn out to be the economic catastrophes that congressmen and their constituents fear. A base closing can be an economic bonanza for a community." Armey, *Base Maneuvers: The Games Congress Plays with the Military Pork Barrel*, 43 Policy Review 70, 75 (Winter 1988).

Congress' concern for the communities' ability to redevelop closed bases led it to establish a closure process that emphasizes speed and finality. This is reflected in the express purpose of the 1990 Act: "The purpose of this part is to provide a fair process that will result in the *timely closure and realignment of military installations* inside the United States." 10 U.S.C. § 2687 (emphasis added). The 1990 Act achieves this purpose by imposing strict time limits on the process by which bases to be closed are selected, eliminating the applicability of statutes that had

previously been used to delay base closures, and establishing a process to select and close obsolete bases in a manner that provides communities with the certainty they need for conversion efforts. By permitting judicial review of the base closure process, the Third Circuit's decisions in *Specter v. Garrett*, 995 F.2d 404 (3rd Cir. 1993) (*Specter II*), and *Specter v. Garrett*, 971 F.2d 936 (3rd Cir. 1992), *vacated and remanded*, No. 92-486 (U.S. Nov. 9, 1992) (*Specter I*) undermine this carefully crafted statutory scheme and will expose communities affected by base closure to economic harm in precisely the manner Congress sought to avoid.

1. As Congress recognized, central to ensuring that affected communities can respond successfully to a base closing is the speed and certainty with which such a decision is made and executed. Judge Alito correctly emphasized in his dissent that "[t]he legislative history makes it abundantly clear that speed and finality were regarded as indispensable components of the new scheme." *Specter I*, 971 F.2d at 958 (Alito, J., dissenting). Representative Armey expressly articulated the importance of speed and finality for the affected communities:

Let me add that one huge advantage to this base closing procedure is that it allows a base closing decision to be made *with some finality*. In the past, proposed base closings were often disputed for year [sic] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base *were greatly harmed by the persistent uncertainty*.

Under this procedure, however, all the communities affected had a chance to thoroughly

make their case for their base. Now, *this time of deliberation will come to an end and the decision will be made*. At this point, communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

I have no doubt that many, if they are hard working and skillful, will do quite well. . . . Often they have ultimately employed more people and offered a larger tax base than the community enjoyed when the military was operating the property. There is hope after base closure.

137 Cong. Rec. H6008 (daily ed. July 30, 1991) (emphasis added).

As this passage clearly shows, Congress intended the base closure process to have finality, to reach a definite end so that the decision could not be "disputed for year [sic] before a final verdict was rendered." The 1988 and 1990 Acts were intended precisely to eliminate roadblocks that previously had permitted "a single Member or even a citizens group [to] stop a base closing simply by tying the matter up in court." 134 Cong. Rec. H1615 (daily ed. April 13, 1988) (statement of Rep. Armey).³

Permitting litigation once again to obstruct actual closures would create uncertainty among the business

³ The House Conference Report for the 1990 Act stated: "[C]losures and realignments take a considerable period of time and involve numerous opportunities for challenges in court. . . . A new process involving an independent, outside commission will permit base closures to go forward in a *prompt and rational manner*." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3258 (emphasis added).

community and disrupt community efforts to "find the best way to adjust to the base closure." 137 Cong. Rec. at H6008.

The 'what's done is done' attitude is vital to a community's successful readjustment. . . . The Defense Department will announce its desire to close the base, pending the outcome of the environmental studies, and the community leaders immediately devote themselves to preventing it rather than preparing for it. If the base is finally closed anyway, no one will have done the work necessary for an easy transition. . . . [C]ommunity leaders must know from the beginning - *with certainty* - whether or not a closure will occur 12 to 18 months hence. If they have that advance notice and are not encouraged to attempt to avert the closure, the result can be very successful.

Armey, *supra*, at 75 (emphasis added).

2. Congress intended not only that a decision to close a base be final, but also that the decision be executed rapidly. It was the element of speed that led Congress in both the 1988 and 1990 Acts to provide for a specific period of time in which the selected bases were to be closed. Congress was "opening a window for a finite period of time in order that the Secretary may carry out a specific task which is vital to the security and the budgetary health of this Nation. When the task is completed, the window will be closed." 134 Cong. Rec. S4973 (daily ed. April 27, 1988) (statement of Sen. Roth).⁴ Without a

⁴ The "window" for the 1988 Act will close in 1995, and for the 1990 Act in 1997. Congress contemplated that such a

definite ending point, the Defense Department could unduly extend the process of actually closing a particular base, thus postponing the potential savings Congress had hoped to achieve. *Id.* The window also helps ensure that communities will have access to the base within a specified period of time. Having established a finite period for all selected bases to be closed, Congress could not have intended to permit procedural disputes to tie up closure efforts in court.

Moreover, Congress contemplated that within this window bases would be made available for reuse without undue delays. The 1990 Conference Report stated that "the new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignments." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 707 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3259 (emphasis added). Then-Representative Les Aspin reiterated this objective - that the need for speed was important *after* bases had been selected for closure - on the House floor: "[The 1990 Act] streamlined current law on base closures to allow for the expeditious closure of bases *once the decision to close had been fully reached under the process.*" 137 Cong. Rec. H6007 (daily ed. July 30, 1991) (emphasis added).

Indeed, while deliberating on the 1990 Act, individual legislators were experiencing first-hand the problems resulting from delays in implementing closures of bases

window would assist communities in their planning efforts. H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 19 (1988), reprinted in 1988 U.S.C.C.A.N. 3355, 3399.

already selected under the 1988 Act. As exemplified by Representative Vic Fazio's experience, speed in the *execution* of a base closure was just as important as speed in the *selection* of which bases should be closed. In the summer of 1990 Representative Fazio rose in support of a bill that would have eased the delays confronted by communities:

[C]ommunities were promised in the [1988 Act] that they would be able to develop the bases to create civilian jobs and restore civilian investment in the local economy. They were promised that they would be able to achieve these objectives by 1995.

....

With neither a change in the current funding scenario nor clear direction from Congress that cleanups at base closure sites should be given priority, communities will not be able to convert these military installations to the most beneficial use in a timely fashion. Mr. Speaker, this prospect is diametrically opposed to the intent of the [1988 Act] and must be corrected.

136 Cong. Rec. E2173 (daily ed. June 27, 1990) (emphasis added). See also 137 Cong. Rec. H5860 (daily ed. July 30, 1990) ("[a] fundamental tenet of the [1988 Act] was to enable affected communities to convert [installations selected for closure] to civilian use in an *expeditious manner*." (statement of Rep. Fazio) (emphasis added)).

Concern for speedy execution of base closure decisions led the Senate to adopt a measure in 1991 that, among other things, would have imposed a strict time limit after closure for the Defense Department to convey a military base to the

local community. Amendment No. 1034 to the National Defense Authorization Act for Fiscal Years 1992 and 1993, 137 Cong. Rec. S11778 (daily ed. August 1, 1991) (text of amendment); 137 Cong. Rec. S11941 (daily ed. August 2, 1991) (adoption). The bill's sponsors felt that without a tight deadline, closed bases would "stay there while the economies of these closed base communities die on the vine." 137 Cong. Rec. S11934 (daily ed. August 2, 1991) (statement of Sen. Johnston).⁵ Efforts such as these to speed even further the implementation of base closure decisions show the extent of congressional concern that bases be made available quickly to local communities.

3. By suggesting that Congress contemplated that the process of closing bases following their selection could be delayed by litigation, the majority in *Specter I* ignores the plain evidence of legislative intent to the contrary. The majority acknowledged that "Congress clearly intended that the final decision on base closing and realignment be reached with alacrity." 971 F.2d at 946. Moreover, the court declared that "[w]ith a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously

⁵ Though adopted in the Senate, this measure was not adopted by the Conference Committee due to its controversial provisions for transferring closed bases to local communities at no cost. H.R. Rep. No. 311, 102d Cong., 1st Sess. 640 (1991). The Conference Report nevertheless acknowledged the importance of the amendment's underlying concern for timeliness: "The conferees are sympathetic to the economic turbulence encountered by communities that are adjacent to closing military installations. . . . [T]he Senate provision highlights a number of obstacles to *timely redevelopment* of closing military installations." *Id.* at 640, 641 (emphasis added).

jeopardized if litigation were permitted to divert their attention." *Id.* If the court had stopped there, its analysis could not be questioned. Yet the court went on to find "little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established." *Id.* at 948.

This bifurcation of the closure process between the process of *selecting* bases to be closed and the process of *actually closing* bases finds no support in the legislative history.⁶ Congress intended the entire closure process, from selection to actual closure, to operate "with alacrity" so that the Federal Government could realize the economic savings of eliminating obsolete bases as quickly as possible, and so that communities could get on with the business of converting bases to civilian use.⁷ A swift selection of bases for closure means little if those bases cannot be closed with some promptness and certainty

⁶ The majority apparently reasoned that because the business of actually closing a military base "is complicated and time-consuming," 971 F.2d at 948, Congress did not harbor any special desire for speed and finality after the selection had been made. As demonstrated above, however, the complicated and time-consuming nature of closing bases was the main catalyst in the passage of the 1988 and 1990 Acts.

⁷ Congress' concern for expedition did not preclude providing communities with an opportunity to present their views. The 1991 Defense Base Closure and Realignment Commission (the "1991 Commission") held public hearings during which it received and considered extensive comments from the affected communities, and the local economic impact of the base closure was one of its selection criteria. Defense Base Closure and Realignment Commission, *Report to the President* at 1-2, 4-1, 5-2 through 5-45 (1991) ("1991 Commission Report").

once selected. Indeed, the mere announcement of a desire to close a military base under the pre-existing system could "by itself . . . hurt the local economy." Arme, *supra*, at 72. Congress could not have intended for bases to be selected quickly and publicly, only to have those bases languish in litigation while local communities suffered.

The majority in *Specter I* concluded its analysis with this extraordinary statement: "In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme." 971 F.2d at 948. This analysis shows little appreciation for the difficulties communities face in successfully redeveloping closed bases. Without the speed and finality provided by Congress' statutory scheme, conversion efforts will be stymied. Judicial review, therefore, is fundamentally at odds with Congress' intent.⁸ As the majority itself acknowledged, "we know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans." *Id.* It was precisely this sensitivity and concern that led Congress to design a process for base closure that maximized the potential for community redevelopment. Experience confirms Congress' view. Research on how communities have dealt with base closure demonstrates that Congress correctly

⁸ Furthermore, judicial review is ordinarily not "brief." Permitting judicial review will not only delay further a final decision on the Philadelphia Naval Shipyard, it will also impose countless delays on the entire process, calling into question bases selected in 1988, 1991, 1993, and future rounds of base closures.

appreciated the need for certainty and speed in the process of actually closing military bases.

II. EXPERIENCE SHOWS THAT SPEED AND FINALITY ARE ESSENTIAL FOR COMMUNITIES TO RECOVER SUCCESSFULLY FROM BASE CLOSURES.

The studies conducted to date on how local communities successfully deal with base closures confirm that, with appropriate community planning and direction, "communities can recover and flourish." Keith Cunningham, Business Executives for National Security, *Base Closure and Reuse: 24 Case Studies* 6 (1993) ("BENS Study"). See also Defense Secretary's Commission on Base Realignment and Closure, *Base Realignments and Closures* 25 (1988) ("1988 Commission Report").⁹ Experience has taught, however, that certainty and speed in implementing base closure decisions are essential for community redevelopment efforts to succeed. As the 1991 Commission found, "[f]ull economic recovery from base closure is dependent upon *timely disposition* of the facilities and land vacated by the services. The Secretary of Defense should do everything in his power to ensure a *timely*

⁹ A comprehensive survey of communities affected by base closures from 1961 to 1990 similarly concluded that "the experience of communities affected by earlier base realignments clearly indicates the communities can successfully adjust to dislocations and base closures." Office of Economic Adjustment, Department of Defense, *Civilian Reuse of Former Military Bases* 2 (1990) ("OEA Study"). The OEA Study documented that communities created 158,104 new jobs to replace the 93,424 civilian military jobs lost when the bases closed. *Id.* at 1.

transfer of these valuable assets to the local communities." 1991 Commission Report at 6-1 (emphasis added).

Converting a closed military base to civilian use presents numerous challenges. Communities must find short- and long-term uses for the real estate, buildings, production facilities, housing, equipment, and infrastructure that comprise the closed bases, and must do so in a manner that creates as much employment and income for the community as possible.¹⁰ Base closure studies have shown that to be successful, communities must, among other things: (1) establish a community organization to lead the redevelopment effort and prepare comprehensive redevelopment plans; (2) begin non-military use of a base as soon as possible, often before the military's departure is complete; (3) market the former base to prospective tenants and purchasers; (4) secure the financing required to fund redevelopment efforts; and (5) change applicable zoning, land use, and municipal laws to accommodate the proposed new uses of the former base. See generally BENS Study at 2-3; 1991 Commission Report at 6-1; 1988 Commission Report at 26; President's Economic Adjustment Committee, Department of Defense, *Planning Civilian Reuse of Former Military Bases* 1-28 (1991) ("Reuse Manual"). An overview of these activities is set out in timeline form at page 11 of the attached Appendix; each activity is addressed in greater detail below.

¹⁰ Common uses for closed bases include airports, educational facilities, hospitals, recreational areas, industrial parks, and manufacturing facilities. BENS Study at 7; OEA Study at 1, 3-14.

1. Early organization and planning have proven essential to past redevelopment efforts. Determining how best to reuse a closed base is no easy task.¹¹ Communities must inventory the existing buildings, facilities, and equipment on the base, and match those assets against potential future uses. Reuse Manual at Supp. 10-12.¹² They must organize themselves and formulate detailed plans to identify public and private entities that might be interested in using the base, improve and expand rail and road access to the base (military bases often restrict access for security reasons), maintain and upgrade the existing utility infrastructure, and make cosmetic changes to give the base a civilian image (e.g., remove military

¹¹ According to the Economic Adjustment Committee:

It is important to realize that it is vastly more complex and difficult to adapt an industrial park design or a public use design to a former military base than to develop a master plan for a purpose on raw acreage. The reasons are manifold and relate to the age of the facility, limited-road access, internal utility lines and road patterns which may not relate to new civilian uses, the lack of internal lot and parcel boundaries, and occasionally inadequate engineering plans for the base.

Reuse Manual at 2 (emphasis in original).

¹² For example, former Air Force bases naturally lend themselves to reuse as civilian airports, but even such a logical transition involves considerable investments of capital, time and effort, as civilian airport standards require substantial upgrades to military facilities. BENS Study at 8. "Conversion of an air base into a civilian airport . . . would use existing infrastructure, have the potential to create a large number of high-quality jobs, and appear on the surface to be a simple and inexpensive option. . . . As many of the communities studied have already discovered, developing an airport is neither cheap nor easy." *Id.*

markings such—as camouflage paint, remove military structures and artifacts). *Id.* at 4-15, Supp. at 4-23. During this organization and planning process, communities must simultaneously negotiate with the federal government to obtain rights to use the facilities.¹³

Once the decision-making process for selecting bases to be closed has been completed, successful communities have been able to take the resources that might otherwise be dedicated to opposing the base closure and use them to organize and generate momentum for the redevelopment effort. BENS Study at 2, 7.¹⁴ For example, the communities surrounding Fort Ord, California, after challenging the base's closure, redirected the organization fighting the closure toward reuse planning. This effort was instrumental in attracting a 25,000-student branch campus of the California State University System. *Id.* at 61. Similarly, the communities surrounding England

¹³ After the base selection process has been completed, the Secretary of Defense initiates procedures to dispose of excess real and personal property pursuant to applicable statutes (e.g., Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 484). 1990 Act, 10 U.S.C. § 2287(b). These statutes require that such property be screened for use by federal, state, and local governments, public interests, and private investors, under a prescribed procedure and order of priority. Reuse Manual at 8-9. The Secretary of Defense must consult with state and local governments before disposing of the property. 1990 Act, 10 U.S.C. § 2287(b).

¹⁴ Most communities have reacted to the news that their bases were being considered for closure by immediately organizing themselves to voice their opposition. 1991 Commission Report at 4-1; BENS Study at 1. Thus, organizations and community attention are ready at hand to be directed to redevelopment after base closure decisions become final.

Air Force Base in Alexandria, Louisiana, organized a redevelopment committee to develop a "contingency plan" for base closure before the decision became final, and were able to attract an important tenant to begin operations on the former base before it closed. *Id.* at 38-40.

Time is of the essence in this organization and planning effort.

Time is especially critical for the Defense impacted community. The early recovery steps should be effected prior to the actual base or activity phase-down. The out-migration of talented local residents could otherwise represent a very difficult loss to the long-term recovery and growth of the area.

Reuse Manual at 3.¹⁵ Indeed, the announcement that a base will close can itself undermine the confidence of local businesses and deter future investments unless counteracted swiftly. "When . . . market signals have been interrupted by a major employment or economic loss, economic confidence can be restored through the formulation of a well-conceived development strategy by the local community leadership." *Id.* It is at this time that

¹⁵ See also 1991 Commission Report at 6-1 ("Successes can result from two things: early creation of an organization to plan and implement a suitable base reuse strategy, and aggressive marketing of base assets and available facilities."); BENS Study at 2 ("[Communities should] [s]tart reuse planning the moment the closure becomes final."); OEA Study at 23 ("In Bangor, planning started as soon as the closing was announced, and because of that . . . the city was able to avoid a sharp economic downturn.").

focusing community efforts on forming a redevelopment strategy is of crucial importance.

The most precious local resources are the time and attention of its local leaders. Without a development strategy, these resources can be readily exhausted by the failure of the community's first ventures during the recovery or adjustment process. It is essential that these first recovery actions be successful and lend themselves to creating *momentum*.

Id. (emphasis in original). In the absence of an early and coherent redevelopment strategy, the community will be unable to stem the "outflow" of local businesses and investment.

Thus, the majority's statement in *Specter I* that "the ability of the participants to meet their responsibilities [with respect to the selection process] would be seriously jeopardized if litigation were permitted to divert their attention," 971 F.2d at 946, applies with equal force *after* the decision to close a base has been reached. Litigation diverts the attention of key participants from the organization and planning activities that are so necessary for base redevelopment. Indeed, in Philadelphia, the BENS Study found that "[m]oney and attention devoted to the legal challenge [have] divert[ed] scarce resources from the difficult redevelopment process," so that Philadelphia has yet to complete a plan for base reuse. BENS Study at 7, 63, 87.

2. Finding an interim use for the base as quickly as possible during the military's withdrawal is essential for cushioning the effect of unemployment as the military ceases its operations, defraying the operating costs

involved in maintaining the facilities, and ensuring sufficient occupancy of base buildings to prevent vandalism. Reuse Manual at 15. Military operations commonly phase out in stages during the base closure period. By finding tenants who will lease all or part of the base facilities from the federal government prior to the final closure date, the community simultaneously begins the conversion process and mitigates the immediate economic impact of base phase-out and closure.

[Communities have used] the military phase-down period and the GSA property disposal period to secure *interim use tenants* whose operations are consistent with the long-term base reuse plan. Once the community secures title to the facilities, these tenants can then acquire the facilities outright from the community or provide lease payments to the community management entity. In any event, the cost of maintenance for the facilities is imposed on the tenant/owner.

Reuse Manual at 15 (emphasis in original).¹⁶

Without the certainty that a base closure decision is in fact final and not subject to reversal or reconsideration,

¹⁶ For example, England Air Force Base was scheduled for operational closure on December 15, 1992. Twelve companies applied to the local community organization for interim leases, the first of which was granted to J.B. Hunt Transport Inc. The early start allowed J.B. Hunt to establish a driving school on the base and graduate its first class before the facility closed. BENS Study at 38-39. A second example is Fort Devens, a U.S. Army training facility 30 miles north of Boston, Massachusetts (scheduled for closure in June 1996). On April 6, 1993, an inter-modal rail depot operated by Guilford Transportation opened on Fort Devens property. The ground breaking for an approved federal prison is also expected before Fort Devens closes. *Id.* at 32-33.

communities will encounter greater difficulties in obtaining attractive tenants who will commit to even interim leases, much less make longer term commitments. Early tenants often determine the success or failure of a redevelopment effort.

It is important to recognize that the quality and tone of the new base redevelopment will be influenced heavily, if not determined, by the first tenant or prospect for the base. . . . [I]t may be appropriate to pre-select a 'seed tenant' who will fit the optimal market mix for the development.

Id. at 7-8 (examples omitted). Neither public nor private entities will be interested in making the necessary investments of time, money, and effort to move onto a base and enter into a formal lease arrangement if the closure decision is being challenged by the very community that is seeking to attract their business.

Under such circumstances, the only tenants who will move on the base will be those interested in temporary arrangements under short-term leases. Short-term tenants are less likely to make the investments in upgrading the infrastructure required for the long term redevelopment of the base. In contrast, interim leases should be granted primarily to tenants who wish to remain on the property over the long term. "Attracting *permanent* tenants for the property, once disposal occurs, is an integral part of a community's strategy for economic recovery." 1991 Commission Report at 6-1 (emphasis added).

The long-term success of the base reuse plan can be determined by how effectively the communities have planned, developed, financed, and

merchandised the available industrial tracts rather than just how rapidly the community has secured the reuse of the existing few prime industrial buildings on the former base.

Reuse Manual at 7 (emphasis in original). Failure to attract long-term tenants will necessarily affect the community's ability to generate employment. Indeed, the Reuse Manual counsels communities not to "[fill] the base up" rapidly without obtaining "solid commitments on expected uses or anticipated job levels." *Id.* at 6. Without a firm and final closure decision, prospective tenants will not be willing to give such commitments.

3. While a community is defraying its operating expenses through interim leases, it must obtain financing from public and private sources to fund the redevelopment effort. Primary among the needs for funds is the effort to acquire the facilities themselves from the federal government. Bases closed during the 1960s and 1970s were often transferred to local communities for nominal value. For example, Dow Air Force Base in Bangor, Maine, worth an estimated \$200 million in 1964, was conveyed to the local community for \$1. OEA Study at 16. According to the 1988 Commission, redevelopment efforts prior to the 1988 round were successful in part because of the Defense Department's ability "to turn over to the communities the bases' land, facilities, and equipment. Often these assets were elaborate, substantial, and valuable." 1988 Commission Report at 27. Beginning with the 1988 closures, however, circumstances changed. "[T]he federal government has made a concerted effort to realize proceeds from the disposal of assets. . . . [T]here is a clear expectation that the Department of Defense will

derive financial benefit from the sale of base-closure real estate." *Id.*¹⁷

Communities must now either purchase the assets directly from the government at fair market value (depending on the intended use), or wait for the government to sell the assets directly to private parties through competitive bidding. Reuse Manual at 9-10. While the latter is less costly for a community, it also means that "the community does not have any influence in the selection of the ultimate use or owner." *Id.* at 10. According to the 1988 Commission, "[c]ommunities would often prefer that properties be conveyed expeditiously so that economic recovery can get off to a quick start, and the government's waiting for reasonable bids may frustrate that goal." 1988 Commission Report at 27. The Reuse Manual advises communities to purchase some base property outright, even though it could be obtained at lower cost if limited to a public purpose, because such lower cost conveyances contain use restrictions that would drive off certain private investors.

Most banks and other long-term credit institutions will not finance construction or improvements on a leasehold with any type of deed restrictions. As a result, many industrial and commercial firms will insist on having clear fee-simple title to the facilities and land on which they plan to make extensive investments.

Reuse Manual at 10.

¹⁷ As described in note 5 *supra*, Congress considered, but did not adopt, a provision that would have provided for no-cost transfers of base assets to local communities.

In addition, communities will need to obtain financing to maintain, improve, and change the base facilities for the planned new uses. The bases available to communities for reuse are often not in optimal condition.¹⁸ Substantial investment may be required to bring even well-maintained facilities to civilian standards.¹⁹ Finally, the public or private entities that will be using the base will have to make investments of their own to modify the facilities to accommodate their specific needs.

Certainty that a base will close, is, of course, essential for the commitment of funds to any proposed project. Without such certainty, and without some assurance that litigation will not unduly delay closure activities, communities may not be able to secure necessary financing.

Timing is a particularly precious commodity for private investors. When a community has assembled a package that includes private investment, success often depends on getting

¹⁸ The condition of the bases was an explicit consideration in determining whether the base should be closed. See 1988 Commission Report at 14 ("In their visits to military installations, the Commissioners were struck by the number of deteriorating facilities."); 1991 Commission Report at C-1.

¹⁹ For example, converting a military airfield to civilian use often requires substantial work. See note 16 *supra*. The San Bernardino International Airport Authority in California has already spent \$11 million dollars of public grants and private loans planning for the July 1994 closure of Norton Air Force Base. Tom Gorman, *A Bolt from the Blue*, Los Angeles Times, Sept. 26, 1993, at 3. And Kansas City must secure millions of dollars of financing to bring Richards-Gebaur Air Reserve Station up to civilian airport standards, as well as to cover the \$13 million annual operating budget. BENS Study at 68.

real-estate matters settled so that redevelopment can proceed.

1988 Commission Report at 27. If, as the Reuse Manual points out, "banks and other long-term credit institutions will not finance construction or other improvements on a leasehold with any type of deed restrictions," Reuse Manual at 10, they would be even less likely to provide financing when the closing of the base is itself in doubt.

The private sector is already reluctant to invest in defense conversion efforts, as found by BENS in an analogous study of defense conversion issues. Erik R. Pages, Business Executives for National Security, *Next Steps in Business Conversion: Supporting Innovation and Entrepreneurship* 7 (1993) (documenting the difficulties that conversion efforts have in securing private sector financing). Reducing the degree of certainty of closure would make securing significant private sector financing even more difficult, if not impossible. Without private financing, communities would have to raise local taxes or increase deficit spending in order to make necessary expenditures to maintain and improve base facilities. The limited amounts of federal assistance available to affected communities would not be able to cover the loss of private investment.²⁰

²⁰ "Within the last decade there has been a diminution of federal money available to assist affected communities." 1988 Commission Report at 28. According to the 1988 Commission, the Economic Development Administration had only a fraction of its previous funding to assist the communities affected by the closure of 86 bases in the 1988 round. *Id.*

4. Once the decision to close a base becomes final, affected communities typically form an organization to market the base to potential tenants and purchasers. Crucial to successful redevelopment is "aggressive marketing of base assets and available facilities." 1991 Commission Report at 6-1. Such marketing efforts must get underway immediately if the community is to obtain the necessary commitments from potential end users of the base.

Marketing requires communities to invest time and money not only to develop pamphlets, brochures and other marketing materials for delivery to appropriately targeted audiences, but also to make actual improvements to the base to make it attractive to potential users. The 1988 Commission reported that

[Successful communities] assembled dedicated teams that not only drafted ambitious plans, but also made their cases effectively to public agencies and private companies, often travelling extensively to do so. The best of the organizers were relentless. The communities went to great lengths to make themselves and the former bases attractive to investors and business. Roads were built; sewer pipe was laid; and services were improved.

1988 Commission Report at 26.

In recent redevelopment efforts, similar investments have been made to market bases to potential investors. To market the Presidio of San Francisco, the Department of the Interior has developed a 150-page, highly professional marketing booklet to help it attract tenants to the base, which is scheduled for closure in April of 1995. In Mesa, Arizona, the community redevelopment organization's early and aggressive marketing of Williams Air

Force Base was instrumental in the community's successful efforts to obtain commitments from three private sector tenants, who will move onto the base immediately following the Air Force's departure. BENS Study, Resource Annex at 105-112.

Like the other activities necessary for base reuse, marketing efforts depend on the base closure decision having finality. Without a firm commitment on a closure date, potential tenants may move to other locations. For example, Chase Field Naval Air Station in Beeville, Texas, lost commitments from several potential tenants because it was unable to verify interim lease dates from the Navy. BENS Study at 30. Judicial review would frustrate marketing efforts by calling base closure dates into question.

5. In addition to focusing outward to attract investment, communities must focus inward to resolve jurisdictional disputes and make appropriate changes in zoning and land use laws. A closed base rarely falls within the boundaries of a single municipality, and even if it does, potential disputes among local, county, and state governments must be resolved. "Unless communities start working together immediately, these ambiguities can lead to damaging turf battles among the interested governments. Such disputes delay planning and can cause problems in applying for federal aid." BENS Study at 10.²¹ Of the 24 bases studied by BENS, 15 succeeded in moving quickly

²¹ For example, Lowry Air Force Base in Colorado fell between the Colorado cities of Denver and Aurora. Initially the cities disagreed on reuse plans, but they were able to come to a compromise on zoning rights before operational closure, scheduled for September 1994. BENS Study, Resource Annex at 49.

to reach regional and state consensus on how to use the closed bases. *Id.* Settling such jurisdictional disputes requires the time and attention of community leaders; time and attention which would be otherwise occupied by litigation challenging the base closure decision.

Community leaders must also make necessary zoning changes to accommodate the different uses selected for the base.

While zoning requirements usually are not applied to active military installations, the transfer of ownership from the military to civilian uses will require appropriate zoning designations as determined by the local community. Zoning, in fact, is the primary tool available to communities to control the type, density and location of development at a former military site.

Reuse Manual at Supp. 12. Given the important role zoning plays in redevelopment, communities must begin taking the necessary legislative and regulatory steps to put in place a zoning scheme by the time the base is open for community reuse. Judicial review of base closure decisions can only delay such efforts, since changes to applicable laws must await the ultimate outcome of any pending legal challenges.

CONCLUSION

Actual experience confirms what Congress anticipated in crafting the 1990 Act, that speed and finality are crucial for communities to successfully convert military bases to civilian use. Every stage of the redevelopment process hinges on bases being closed without the delays and uncertainties that accompany litigation. Judicial review is therefore fundamentally inconsistent with Congress' intent – manifest in the text and legislative history of the 1990 Act – to close military bases in a manner that maximizes the potential for communities to succeed in redevelopment efforts.

For the foregoing reasons, and for the reasons set forth by petitioners in their Brief, the judgment of the U.S. Court of Appeals for the Third Circuit should be reversed.

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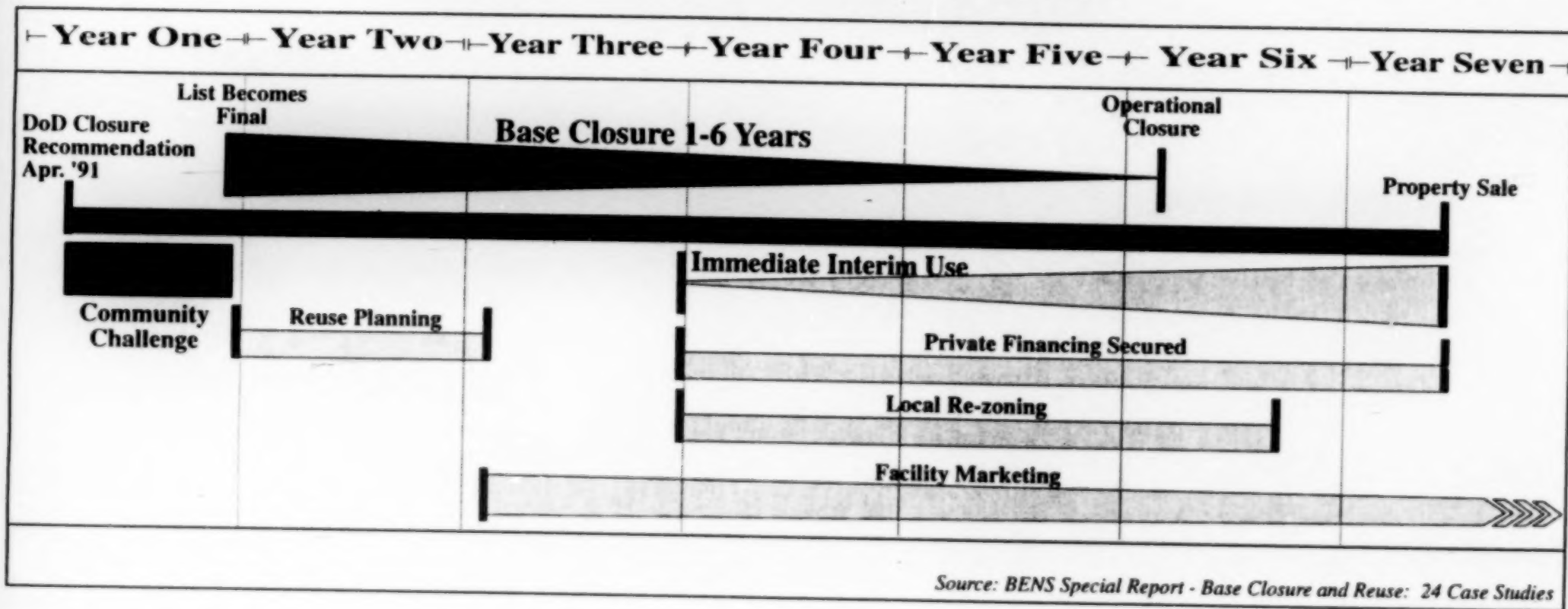
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IN THE

Supreme Court of the United States

October Term, 1993

JOHN H. DALTON, Secretary of the Navy, *et al.*,

Petitioners,

against

ARLEN SPECTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

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(3588—1994)

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Interest of the *Amicus Curiae*

New York has a strong economic and military interest in ensuring that military bases in the State and the Plattsburgh Air Force Base ("PAFB") in particular, remain open. The closure of the base will have a significant impact on the State's economy in the North Country region and will mean the loss of more than three thousand jobs. In addition, New York relies on the PAFB for state military operations and the closing of the base will adversely affect the State's military readiness.

On December 6, 1993, the State of New York, the Governor of New York, legislative officials, unions and persons employed at the PAFB ("the State of New York"), commenced an action in federal court against the Defense Base Closure and Realignment Commission ("the Commission") and its members, the Secretary of Defense ("the Secretary") and the Secretary of the Air Force, challenging the process used and determination made by the Commission in 1993 and accepted by the President, to close PAFB. *The State of New York, et al. v. The Defense Base Closure and Realignment Commission, et al.*, Complaint ("Cplt."), 93-CV-1525 (N.D.N.Y.) (TJM). As set forth in its federal complaint,¹ New York alleges: that the decision to close PAFB was made in violation of neutral, objective legal standards contained in the Defense Base Closure and Realignment Act of 1990 ("the 1990 Act"), that the role of the Secretary under the 1990 Act in issuing and then applying certain criteria to a force-structure plan was usurped by the unauthorized acts of the Commission, and that the President exceeded his authorized powers in approving the

¹"____a" refers to the pages from New York's federal complaint which is an appendix to this brief.

Commission's recommendation to close the base.²

Both in its own case and before this Court, New York has a strong public policy interest in seeking to ensure that the President and the Congress make informed decisions about national security pursuant to a fair and orderly process that gives appropriate recognition to the military importance of the PAFB in defending this country. The Second Circuit recently held that claims of violations of the 1990 Act are justiciable, for the reasons set forth by the Third Circuit in *Specter. County of Seneca v. Cheney*, ___ F.3d ___, 1993 WL 504463 at p. 11, n.2 (2d Cir. Dec. 9, 1993). New York therefore has a substantial interest in supporting respondents' arguments in favor of judicial review.

Petitioners' arguments opposing any form of judicial review are completely at odds with Congress's intent to provide a "fair process" for closing military bases. If judicial review is precluded, the Commission will have been allowed to close the Philadelphia Naval Shipyard without observing any of the constraints Congress imposed on its decisionmaking. The federal government's harsh and extreme position in the *Specter* case thwarts the will of Congress.

²Specifically, on March 15, 1993, the Secretary sent to Congress and the Commission his 1993 report for base closures and realignments which contained no recommendation for PAFB to be closed or realigned but recommended that PAFB become the east coast home base of one of the newly-conceived composite units called Air Mobility Wings. *DoD Base Closure and Realignment Report to the Commission* ("1993 DoD Report") (March 1993), Vol. V, p. 37. Nevertheless, the Commission decided to consider PAFB for closure or realignment and ultimately recommended to the President that it be closed without following the standards and limitations contained in the 1990 Act. 20a-23a. The President accepted the Commission's recommendation to close PAFB when he approved all of the Commission's recommendations. 24a

Statement of the Case

The 1990 Act, as amended, 10 U.S.C. 2687 note (Supp. IV 1992),³ is the latest in a series of statutes⁴ enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed or realigned.⁵ The 1990 Act was passed by Congress to provide "a fair process" for the timely closing and realignment of military installations inside the United States. § 2901(b). In order to ensure that the process is fair and orderly, the 1990 Act requires that specific standards and timetables be adhered to at each of five stages.

The first step in the closure process principally takes place within the Department of Defense. The 1990 Act specifies that, as part of the Department of Defense's budget for fiscal years 1992, 1994 and 1996, the Secretary formulate a force-structure plan for the Armed Forces based on an assessment by the Secretary of probable threats to the national security for a six-year period and transmit that plan to Congress and to the Commission. § 2903(a).

³The 1990 Act was enacted as Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. It is codified at 10 U.S.C. 2687 note as sections 2901-2926. The 1990 Act has been amended twice by the Department of Defense Authorization Bills for Fiscal Year 1992/93 and 1993, Pub. L. 102-190 and Pub. L. 102-484. See Brief For the Petitioners ("Pet. Br.") at p. 2, n.1.

⁴The history of the prior statutes is discussed in the Third Circuit's earlier decision in this case, *Specter v. Garrett*, 971 F.2d 936, 939-40 (3rd Cir. 1992).

⁵Realignment is defined in the 1990 Act as "any action which both reduces and relocates functions and civilian personnel positions" § 2910(5).

In addition, the Secretary was required to publish in the Federal Register and transmit to the congressional defense committees the proposed⁶ and final criteria to be used in making recommendations for closing or realigning military installations. § 2903(b). This process was to be completed by February 15, 1991, and the final criteria were to be the criteria used in making recommendations unless they were disapproved by a joint resolution of Congress enacted on or before March 15, 1991. § 2903(b)(2)(A), (B).⁷

The Secretary was then authorized,⁸ “[o]n the basis of the force-structure plan and the final criteria,” to publish in the Federal Register and transmit to the Commission and to the congressional defense committees a list of the military installations that the Secretary recommends to be closed or realigned together with a summary of the selection process that resulted in the recommendation for each installation and a justification for each recommendation. § 2903(c)(1) and (2). This process was to be completed for 1991 closures by April 15, 1991, and for 1993 and 1995 closures by March 15 of the respective year. § 2903(c)(1). The 1990 Act also requires that the Secretary make available to Congress, the Commission and the Comptroller General, “all information” used to prepare the recommendations, and that persons responsible for providing information to the Secretary

⁶The Secretary was required to provide an opportunity for public comment on the proposed criteria for a period of at least thirty days and provide notice of that opportunity in the Federal Register publication. § 2903(b)(1).

⁷On February 15, 1991, the Secretary published eight final criteria governing base closure and realignment. 56 Fed. Reg. 6374. The first four criteria give priority consideration to military value. The other criteria consider return on investment and impacts.

⁸The statute provides that the Secretary “may” publish and transmit his recommendations for installations to be closed or realigned.

or the Commission certify the completeness and accuracy of the information. § 2903(c)(4), (5).

The second step in the closure process involves proceedings before the Commission. The Commission is an independent body whose eight members are appointed by the President with the advice and consent of the Senate. § 2902. The 1990 Act requires the Commission, after receiving the Secretary’s recommendations, to hold public hearings and to transmit to the President a report containing the Commission’s findings and conclusions for closing and realigning military installations. § 2903(d)(1), (2).⁹ The Commission’s report to the President must be transmitted no later than July 1 of each year in which the Secretary transmits base closure and realignment recommendations to it and a copy of the report is simultaneously sent to the congressional defense committees. § 2903(d)(2), (3).

The Commission is empowered to change the Secretary’s recommendations *only* if it determines that the Secretary “deviated substantially from the force-structure plan and final criteria. . . .” § 2903(d)(2)(B)[emphasis supplied]. Even if the Commission makes that determination, the Commission may *not* add an installation to be closed or realigned or increase the extent of realignment from the list recommended by the Secretary unless it also (i) determines that the change is consistent with the force-structure plan and final criteria referred to above; (ii) publishes a notice of the proposed change in the Federal Register not less than thirty days before transmitting its recommendations to the Presi-

⁹The Comptroller General is required to assist the Commission, to the extent requested, in its review and analysis and to transmit to Congress and the Commission a report containing a detailed analysis of the Secretary’s recommendations. § 2903(d)(5).

dent; (iii) conducts public hearings on the proposed change; and (iv) "explain[s] and justif[ies] in its report submitted to the President . . . any recommendation that is different from the recommendation made by the Secretary. . . ." § 2903(d)(2)(C), (D).

The third step in the process consists of the President's review. The President must, by July 15, transmit to the Commission and to the Congress "a report containing the President's approval or disapproval of the Commission's recommendations." § 2903(e)(1). If the President approves all of the Commission's recommendations, he must transmit a copy of such recommendations to the Congress together with a certification of his approval. § 2903(e)(2).

The President may also disapprove any or all of the Commission's recommendations in which case he transmits to the Commission and the Congress by July 15 the reasons for his disapproval. The Commission then has until August 15 to send to the President a revised list of recommendations and the President has until September 1 to approve or disapprove all of the revised recommendations of the Commission and to transmit to the Congress a copy of the revised recommendations together with a certification of approval. § 2903(e)(4). If the President does not act by September 1, or does not approve the revised list of recommendations in their entirety, the closure and realignment process for that year is terminated. § 2903(e)(5).

The fourth step in the process consists of Congressional review. The Congress has forty-five days from the date the President transmits his report and approval certification to it or the date Congress adjourns for the session, whichever is earlier, to enact a joint resolution disapproving the recom-

mendations of the Commission. § 2904(b). *See also* § 2908. If such a resolution is not enacted, the Commission's recommendations, as approved by the President, become final.

In the fifth and final step of the process, the Secretary is required to initiate all closures and realignments no later than two years after the date the President transmits the report to Congress and to complete all such closures and realignments within six years of that date. § 2904(a). *See also* §§ 2905, 2906, 2907.

The legislative history of the 1990 Act demonstrates that Congress sought to craft an expedited closure and realignment process while at the same time ensuring that the process proceeds in an orderly and fair manner with significant public input. The legislative history also supports a meaningful role for the courts in reviewing the Secretary's and the Commission's compliance with the procedural and substantive standards in the 1990 Act.

The Conference Report, from which the final bill emerged, explains that the 1990 Act provides a new process to "permit base closures to go forward in a prompt and rational manner." H. Conf. Rep. No. 101-923 at p. 705, *reprinted in* 1990 U.S.C.C.A.N. 3257. At the same time, the Report notes that the Act provides for "public and Congressional review" of the criteria used by the Secretary in selecting bases for closure or realignment and for the Commission to "publicly evaluate" the Secretary's closure and realignment proposals and report its findings to the President. 1990 U.S.C.C.A.N. 3256. In addition, the Report makes clear that "both the President and the Congress would have opportunities to accept or reject the Commis-

sion's recommendations in their entirety under expedited procedures." *Ibid.* (emphasis supplied)

Finally, the Report seeks to accommodate judicial review within a prescribed period. The Report notes that one of the failings of existing law is that it "involve[s] numerous opportunities for challenges in court." 1990 U.S.C.C.A.N. 3257 (emphasis supplied). However, the Report specifically mentions that judicial review would be limited in only two areas - claims under the National Environmental Policy Act ("NEPA") would be circumscribed and claims under provisions of the Administrative Procedure Act ("APA") concerning rulemaking, hearings and adjudications, 5 U.S.C. §§ 553, 554, 556 and 557, would be precluded since the APA contains an exemption in these sections to the extent there is involved a "military or foreign affairs function." 1990 U.S.C.C.A.N. 3256, 3258.

Summary of Argument

Judicial review of the Commission's and the Secretary's unauthorized actions as well as the President's approval of those actions is available under the APA and the common law, and the 1990 Act does not preclude such review.

The APA entitles respondents, who are aggrieved by the Commission's and the Secretary's actions in recommending the closure of the Philadelphia Naval Shipyard ("the Shipyard"), to challenge final agency action which is contrary to law and in violation of lawful procedure. 5 U.S.C. §§ 704, 706(2). Judicial review of the Commission's actions as well as the Secretary's intermediate actions is available because the Commission's recommendations constitute "final

agency action" within the meaning of the statute. The fact that the President approves those recommendations and the Congress may disapprove them does not render the Commission's actions non-final for purposes of APA review. It is the Commission's recommendations in their entirety and only those recommendations that are transmitted to Congress. § 2903(e). Therefore, it is the Commission's recommendations that directly cause the injury about which respondents and the State of New York complain.

Accordingly, this is not a case like *Franklin v. Massachusetts*, ____ U.S. ____, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) ("*Franklin*"), where this Court held that the "final agency action" was the President's statement to the Congress containing the census count and reapportionment allocation and not the report sent to the President by the Secretary of Commerce. That statement contained the President's independent evaluation of the data and information submitted to him and the President had the unfettered discretion to modify the data and the allocation. In comparison, under the 1990 Act, the President has only a limited ability to cure defects in the closure process at the Secretary and the Commission levels and the recommendations he transmits to Congress are the Commission's, not his own.

In addition, the 1990 Act and its legislative history fully support judicial review under the APA of the Secretary's and the Commission's actions which violate the procedural and objective standards in the statute. The Act itself contains no provision limiting judicial review of agency action under the APA. Moreover, contrary to petitioners' arguments, the history, structure and purpose of the 1990 Act are entirely consistent with the presumption of judicial review. Congress sought only to limit the opportunities for judicial

review that may delay the closure process and specifically restricted review only of claims brought under NEPA. The Court of Appeals below properly balanced Congress's desire for expedition with respondents' entitlement to court review of alleged violations of specific constraints on the Secretary's and the Commission's decisionmaking in the 1990 Act.

Finally, judicial review of the President's actions in approving the Commission's recommendations is authorized under the common law. As the Third Circuit recognized, the courts have historically been available to review unconstitutional and *ultra vires* actions of the President. The President approved the Commission's recommendation to close the Shipyard and therefore allegedly acted in violation of the constitutional separation of powers and contrary to the 1990 Act. This Court's decision in *Franklin*, which held that there is plenary review of the President's allegedly unconstitutional actions under the census provision, is entirely supportive of respondents' position.

ARGUMENT

The APA, the 1990 Act and the common law authorize the federal courts to review the process the Secretary and the Commission followed, as well as their compliance with specific objective standards, in recommending to the President military installations in the United States for closure or realignment.

Respondents seek judicial review to overturn the decision to close the Shipyard because it was purportedly not based upon the type of "fair" process contemplated by Congress in the 1990 Act. As will be shown by New York, judicial

review of the Commission's recommendations to close the Shipyard is available under the APA and the common law. Nothing in the 1990 Act or its legislative history clearly demonstrates that Congress intended to foreclose judicial review of unauthorized recommendations for closure of military installations made by the Commission, or the unauthorized approval of those recommendations by the President.¹⁰

1. APA Review Is Authorized Under 5 U.S.C. §§ 701 *et. seq.*

Respondents (and New York) assert a claim for relief under Section 706(2) of the APA which authorizes the courts to hold unlawful and set aside agency action that is found to be, *inter alia*, arbitrary and capricious, in excess of statutory authority or in violation of lawful procedure. See Joint Appendix ("JA") 58; *see also* 41a-42a. In order to obtain judicial review under the APA, respondents must allege, as they have done, that they have been adversely affected or aggrieved by final agency action within the meaning of the 1990 Act. 5 U.S.C. §§ 702, 704. (JA 11, 13-16). The APA authorizes judicial review of such agency action unless the statute at issue precludes review, the agency action is committed to the discretion of the agency by law (5 U.S.C. § 701[a]) or the agency is not an authority of the Government of the United States or is otherwise excluded from the definition of "agency" in 5 U.S.C. § 701(b).

¹⁰Although New York's complaint does not challenge the actions of the Secretary, who performed his role properly in New York's case, New York's argument is not restricted to actions of the Commission and is fully supportive of respondents' position that the Secretary's conduct can be reviewed.

Petitioners argue that APA review of the validity of the Secretary's and the Commission's actions under the 1990 Act is precluded for two independent reasons: first, the "final agency action" about which respondents complain is the President's decision to close the Shipyard and, under this Court's decision in *Franklin*, the President does not come within the APA's definition of "agency" and his actions are, therefore, not subject to APA review (Pet. Br. at 17-18);¹¹ and second, judicial review is antithetical to the structure, history and purpose of the 1990 Act (Pet. Br. at 35-48). Petitioners' arguments should be rejected.

With respect to the APA, the actions of the Commission constitute "final agency action" within the meaning of 5 U.S.C. § 704 and this Court's decision in *Franklin* is not controlling. In *Franklin*, the State of Massachusetts and others sought to overturn the State's reapportionment based on the census count which included military persons overseas and counted them in their "home of record." The Secretary of Commerce had formulated this policy and the President had accepted it when he ultimately transmitted the final census count and reapportionment figures to the Congress under the automatic reapportionment statutes. A three-judge federal court held that the Secretary of Commerce's decision to count military employees overseas and to use "home of record" as the basis for the allocation was arbitrary and capricious under § 706(2) of the APA. See 112 S.Ct. at 2773, 120 L.Ed.2d at 647.

¹¹Both the Third Circuit below and the First Circuit in *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), held that *Franklin* is controlling with respect to claims brought under the APA. For the reasons discussed below, New York respectfully disagrees.

This Court reversed the lower court's decision and held that the APA did not apply. Writing for the majority, Justice O'Connor concluded that the final agency action was the President's action in transmitting to Congress a statement, based on the Commerce Secretary's report, showing the whole number of persons in each State and the number of Representatives each State would be entitled under an equal apportionment. 112 S.Ct. at 2775, 120 L.Ed.2d at 650.

In reaching this conclusion, Justice O'Connor reasoned that the President has an independent role under the automatic reapportionment statute—he is authorized to modify or reject the policy decisions made by the Secretary of Commerce, make new calculations and direct the Secretary of Commerce to reform the census even after the data is submitted to him. 112 S.Ct. at 2774, 120 L.Ed.2d at 649. Indeed, this Court pointed out that the Secretary of Commerce's report to the President is not promulgated to the public and no official administrative record of it is generated. 112 S.Ct. at 2773, 120 L.Ed.2d at 647. Moreover, "[T]he Secretary's report to the President carries no direct consequences for the reapportionment" and is "more like a tentative recommendation than a final and binding determination. . . ." 112 S.Ct. at 2774, 120 L.Ed.2d at 649.

Justice O'Connor then considered whether the APA applies to the President's actions under the census statutes and concluded that it does not. This Court reasoned that, even though the President is not specifically included or excluded from the APA's definition of agency, "[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that the textual silence is not enough to subject the President to the provisions of the APA." 112 S.Ct. at 2775, 120 L.Ed.2d at 650.

The President's and the Commission's roles in base closure are substantially different from the President's and the Commerce Secretary's roles under reapportionment. Under the 1990 Act, the President is empowered to approve or disapprove the Commission's recommendations in their entirety and, if he approves the recommendations, "transmit to the . . . Congress a report containing the President's approval . . . of *the Commission's recommendations*." § 2903(e)(1)[emphasis supplied] Unlike the statement he sends to Congress containing the census count and reapportionment distribution, the President does not send to Congress a report containing *his* closure and realignment determinations, but he is obliged to accept or reject *the Commission's recommendations in their entirety* and if he approves of all the recommendations, he must transmit a copy of *the Commission's recommendations* to the Congress. § 2903(e)(2).

Moreover, during the brief period of time that he has to review the Commission's report,¹² the President has a limited opportunity, if any, to consider whether the Commission and the Secretary followed proper procedures in arriving at their respective recommendations. Even if the President is dissatisfied with the Commission's actions, the President may only reject its report and transmit to the Commission the reason(s) for his disapproval. § 2903(e)(3). After the Commission sends him its revised report and recommendations, the President again must approve or disapprove the recommendations *in their entirety* and, if he

¹²The President must receive the Commission's report by July 1 and approve or disapprove it by July 15. § 2903(d)(2)(A), (e)(1). With respect to the Commission's 1993 report recommending the closure of PAFB, the President received the report on July 1 and gave his approval to all of the recommendations on July 2. 24a

approves of them, transmit *the Commission's* revised recommendations to Congress with his certification of approval. § 2903(e)(4). Since the 1990 Act requires an all or nothing decision, the President may decide to approve the Commission's recommendations even though he is dissatisfied with particular aspects of the Commission's report.

While the President's actions under the 1990 Act are not ministerial, the report he transmits to Congress contains the Commission's recommendations with his stamp of approval. If Congress does not enact a joint veto resolution, the Commission's recommendations become the "final agency action." It is the Commission's recommendations, once approved by the President, that have direct and immediate consequences for affected persons, communities and entities like the respondents in *Specter* and the State of New York.¹³

The fact that the Commission is required to conduct its proceedings in the public arena and issue a report to the President which is available for public scrutiny, supports respondents' position that the Commission's decisionmaking process has all of the attributes of public accountability to which the APA was intended to apply. New York's complaint shows the important role that public scrutiny would play in judicial review under the 1990 Act -- the record of the Commission's public hearings, meetings and votes demonstrate, *inter alia*, that the Commission simply ignored the

¹³Since the Commission's recommendations constitute "final agency action" within the meaning of the APA, respondents may also challenge the intermediate actions of the Secretary and the Secretary of the Navy pursuant to 5 U.S.C. § 704, which provides that an "intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." -

standard in the 1990 Act that it must find that the Secretary "substantially deviated" from the force-structure plan and the final criteria when it recommended that PAFB be closed. See 20a-23a.

Accordingly, judicial review of the Commission's and the Secretary's actions lie under the APA unless Congress precluded such review in the 1990 Act itself. However, Congress did not do so.

2. The 1990 Act Does Not Preclude Judicial Review

Petitioners' alternative argument under the APA is that Congress intended in the 1990 Act to preclude judicial review of the entire base closure process and the decisions made therein. Pet. Br. at 35 *et. seq.*¹⁴ Since no provision in the 1990 Act states that judicial review of all claims is precluded, petitioners point to the history of the base closure process, the structure and the purpose of the 1990 Act to support their contention. *Ibid.* However, as this Court has stated, "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is per-

¹⁴The Third Circuit held that the 1990 Act impliedly precludes review of substantive challenges made to the base closure process but does not preclude review of claims that the Secretary and the Commission failed to comply with "specific, non-discretionary directives of the" Act. *Specter*, 995 F.2d at 409 and n.5; see also 971 F.2d at 946-53. The Solicitor General contends that the procedural/substantive distinction drawn by the Third Circuit is not supported by the statute and is unworkable. Pet. Br. at 47-48. (The First Circuit in *Cohen v. Rice* did not reach this issue. 992 F.2d at 382, n.5).

New York does not agree that certain actions cannot be reviewed under the 1990 Act if the review can proceed expeditiously and is limited to whether there was compliance with the objective standards in the statute.

suasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).¹⁵

The history, structure and purpose of the 1990 Act show only that Congress sought to expedite the closure process and to limit the opportunities for individual legislators and constituencies to delay closure but they do not demonstrate that Congress intended to preclude all judicial review if the process went awry. See 1990 U.S.C.C.A.N. 3256-59.¹⁶ Petitioners argue that judicial review would disrupt and undermine the "direct, and carefully balanced, participation of

¹⁵If petitioners are correct, the *ultra vires* actions of the Commission in New York's case and of the Secretary of the Navy and the Commission in the *Specter* case would go unchecked. Under petitioners' argument, even if the President was presented with a recommendation to close the PAFB which was issued without any consideration of the force-structure plan and which completely ignored the findings and conclusions of the Secretary, the fact that the President approved the Commission's entire package of recommendations and that Congress could have disapproved the recommendations insulates any particular recommendation from judicial review, including a review as to whether there was compliance with the procedures set forth in the 1990 Act. That position cannot be squared with the language and structure of the 1990 Act, discussed below.

¹⁶The Solicitor General mistakenly argues that the court of appeals erred in applying a presumption of reviewability to challenges arising under the 1990 Act since the presumption is misplaced when sensitive questions of national security and military policy are at issue. Pet. Br. at 36-37. It is the traditional role of the courts to determine whether agency action conforms to clear and objective standards in a statute. The fact that the statute addresses questions of military policy does not affect the presumption of reviewability of such questions. The Solicitor General confuses this presumption with the reluctance of (Footnote continued on next page.)

the President and Congress." Pet. Br. at 40. However, the two are not mutually exclusive.

To the contrary, the purpose and structure of the 1990 Act are entirely supportive of judicial review to ensure that the decisional process is a fair one. Specifically, the fact that the 1990 Act contains substantive standards to limit the Secretary's and the Commission's decisionmaking, requires adherence to strict timetables and provides for public scrutiny, demonstrates that judicial review is compatible with Congress's desire to improve the integrity of the process. As the Third Circuit explained in its earlier opinion in this case:

we know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans and to the importance of public confidence in the integrity of the decisionmaking process. . . . In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme.

Specter, supra, 971 F.2d at 948.

(Footnote continued.)

courts to second-guess national security decisions made by the President and involving military judgment and expertise. More importantly, New York alleges in its case that the Commission, in deciding to close PAFB, ignored the military judgment and expertise of the established federal agency responsible for such decisionmaking. The federal government should not be allowed to use the guise of deference to military decisionmaking to shield the decision of a civilian board from judicial review where that decision is contrary to the recommendations of the country's military policymakers.

Petitioners argue further that judicial review is inconsistent with Congress's goals of expedition and finality and point to the express exception in the 1990 Act from the requirements of NEPA. Pet. Br. at 41-45. While judicial review will mean that a certain amount of delay may have to be tolerated, the delay need not be very long and it does not have to interfere with the Secretary's implementation schedule. Challenges to the Commission's alleged failure to observe the standards of the 1990 Act, such as are alleged in New York's complaint, can be decided in an expedited manner, with minimal (if any) discovery followed by cross-motions for summary judgment under Federal Rules of Civil Procedure 56.¹⁷ As the *Specter* court observed:

Judicial review . . . holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time-consuming, . . . ; bases are not closed or realigned overnight.

¹⁷New York's complaint contains nine claims for relief arising under the 1990 Act, the APA and the U.S. Constitution. 24a-43a (Cplt. ¶¶ 70-145). New York asserts, *inter alia*, that the Commission violated the 1990 Act by determining that PAFB should be closed where: (i) the Secretary made no such recommendation concerning that base; (ii) the Commission failed to determine that the Secretary deviated substantially from the force-structure plan and the final criteria; and (iii) the Commission failed to explain and justify its departure from the Secretary's recommendation. 24a-33a (Cplt. ¶¶ 70-106) In addition, the complaint asserts that neither the Constitution nor the 1990 Act authorizes the President to approve the Commission's recommendations where such recommendations exceed the scope and constitute an abuse of the Commission's authority. *Ibid*.

Specter, supra, 971 F.2d at 948. Similarly, the fact that Congress allowed review under NEPA in some circumstances but not others, and did not specify that judicial review is generally excluded, shows that petitioners' reliance on the NEPA exclusion in the 1990 Act is misplaced. § 2905(c)(2). *See also Specter, supra*, 971 F.2d at 948 and n.10.

Petitioners also cite to a passage in the legislative history suggesting that certain "final agency action[s]" would not be subject to judicial review under the APA and argue that the passage reinforces their contention that Congress intended to preclude review of final agency action. Pet. Br. at 45-46, *quoting* H.R. Conf. Rep. No. 101-923 at 706. Petitioners omit that Congress limited its discussion to Chapter 5 of the APA which makes an exception to rulemaking and adjudication for the conduct of military affairs. That exception does not apply to judicial review based upon 5 U.S.C. § 706(2) which is the section of the APA involved in this case. As the *Specter* court notes, "[T]his passage is at best ambiguous." 971 F.2d at 949.

Finally, petitioners argue that judicial intervention would give rise to serious remedial problems which are incompatible with the structure of the 1990 Act. Pet. Br. at 46-47. Petitioners point out that the Commission goes out of existence after each base closing session is concluded and that the Secretary has a mandatory duty to implement the final decision of the President. *Ibid.*

Petitioners' discussion of remedial problems is premature. Petitioners ignore that the courts have the inherent authority to fashion a remedy least disruptive of the closure and realignment process. Petitioners' statement that the courts lack authority to enjoin the Secretary's performance of his duty to implement the President's decision based on actions that occurred before the President acted, confuses the Court's remedial powers with the merits of whether judicial review properly lies. As this Court recognized in *Franklin*, appropriate relief lies against the agency official responsible for enforcing acts of the President alleged to be unconstitutional. *Franklin, supra*, 112 S.Ct. at 2777, 120 L.Ed.2d at 652. The same principle of law must apply in the event this Court determines that judicial review of the Secretary's and the Commission's actions are authorized.

3. Judicial Review of the Challenged Actions Is Authorized By the Common Law

Petitioners' final argument is that judicial review of the challenged actions is unavailable despite *Franklin's* alternative holding that constitutional challenges to Presidential action are justiciable. Pet. Br. at 19-34.¹⁸ In petitioners' view, the Third Circuit's holding would swallow the *Franklin* rule and the limited exception to that rule for claims properly raised under the Constitution. Pet. Br. at 20.

Petitioners make several points challenging the Third Circuit's reasoning and its conclusion that common law judicial review exists, under the separation of powers doc-

¹⁸Petitioners' argument is premised on its prior argument that the final agency action subject to review is the President's decision to approve the Commission's recommendations. For the reasons discussed above, New York does not agree with that argument.

trine as well as under the 1990 Act itself, for the President's *ultra vires* action in approving the unauthorized recommendation of the Commission to close the Shipyard. See *Specter*, *supra*, 995 F.2d at 409-411. First, petitioners point out that respondents have not alleged that the President violated the Constitution or the 1990 Act and that their only constitutional claim, a denial of due process, was dismissed at an earlier stage of the proceedings.¹⁹ Petitioners then argue that the Court of Appeals improperly reached out to the President's actions and that its analysis that the President violates the Constitution whenever he violates the 1990 Act, under separation of powers, is flawed. Pet. Br. at 19-30.

Respondents have sued the Secretary, the Secretary of the Navy, the Commission and its members and alleged that these petitioners violated their right to a fair process under the 1990 Act and that the Secretaries are authorized to implement the final decision closing the Shipyard. JA 16-17, 57-58. The fact that respondents have not sued the President or specifically alleged that he acted *ultra vires* does not restrict the court's authority to review Presidential action or provide appropriate relief, however.

In *Franklin*, this Court stated that the President's actions can be reviewed in a suit against the Secretary of Commerce. Justice O'Connor's opinion held that declaratory relief against

¹⁹New York's complaint, on the other hand, specifically alleges that the President exceeded his authorized powers under the 1990 Act and the constitutional separation of powers doctrine. 24a-33a, 40a. New York's complaint also alleges that the Commission and the President's actions deprived the plaintiffs of a property interest in the continued operation of PAFB without due process of law. 39a. Accordingly, to the extent petitioners' argument rests on the pleadings alone, New York's complaint would still be entitled to judicial review under the common law. *But see* Pet. Br. at 33-34 and n.22.

the Secretary of Commerce was sufficient to establish standing even though the final agency action under review was that of the President. 112 S.Ct. at 2777, 120 L.Ed.2d at 652. Justice O'Connor noted that injunctive relief against the President was reserved for extraordinary situations, and she reasoned that "[w]e may assume it is substantially likely that the President . . . would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though [he] would not be directly bound by such a determination." *Ibid.* (Emphasis added.) Respondents' suit naming the officials who are responsible for implementing the final recommendation is therefore sufficient to review the President's actions. See JA 16-17, 57-58.

In addition, nothing in *Franklin* or this Court's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) restricts the court's powers to review the President's actions in violation of a statute. See 112 S.Ct. at 2777, 120 L.Ed.2d at 652 ("we may assume . . . that it is substantially likely that the President . . . would abide by an authoritative interpretation of the census statute and constitutional provision. . . .") (emphasis added). See also *Specter*, *supra*, 995 F.2d at 409.

Second, petitioners' argument that the Court of Appeals' reasoning would permit review of every claim of procedural error (Pet. Br. at 24-30) is simply misplaced. As the *Specter* court recognized, "plaintiffs allege that the process underlying the decision to close the Shipyard violated specific nondiscretionary provisions of the" 1990 Act. 995 F.2d at 408-409. Such allegations go to the heart of the statute since they involve the integrity and fairness of the process. Judicial review of such claims is essential because, if respondents are

correct, the recommendations presented to the President were without any basis under the 1990 Act.²⁰

In any event, the President's approval of an unauthorized recommendation of the Commission implicates the constitutional separation of powers. As the Third Circuit properly concluded, the failure of the President to act within his statutorily delegated limits exceeds not only his statutory authority but his constitutional authority as well. *Specter, supra*, 995 F.2d at 409. The Third Circuit's reasoning is the most sensible interpretation of this Court's decision in *Youngstown*, which discussed the President's statutory as well as constitutional authority, and is supported by the *Franklin* decision's reference to the President's compliance with the census statute as well. Petitioners' argument would deny the courts the authority to review Presidential action in violation of statutes (Pet. Br. at 30-34). That position is contrary to the courts' role under the separation of powers doctrine and must be rejected.

Finally, petitioners' contention that, even if the Secretary and the Commission violated the statute, the President did not act *ultra vires* because he is not bound by the recommendations sent to him (Pet. Br. at 24-30), is simply wrong. The 1990 Act provides that the *Commission's recommendations* are transmitted to Congress with the President's certification of approval. § 2903(e). While the President has a single opportunity to disapprove the package sent to him, he must eventu-

²⁰Similarly, New York has alleged that the Commission ignored its statutory authority when it recommended that PAFB be closed without any reference to the force-structure plan and despite any recommendation concerning PAFB in the Secretary's report to it. New York also alleges that the Commission failed to make adequate findings and justifications for its recommendation. 24a-30a. These allegations also go to the integrity of the closure process.

ally approve all of the recommendations and, if he does not, the closure process is terminated. *Ibid.* Under these circumstances, the President's discretion is circumscribed and it is critical that the recommendations of the Commission sent to him comply with the mandatory criteria contained in the Act. When ~~the Commission~~ exceeds its authority under the Act and the President approves a recommendation which is without basis in the statute, the President also acts *ultra vires* and contrary to the 1990 Act. As the *Specter* court recognized:

Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and Congress before the executive and legislative judgments were made.

Specter, supra, 971 F.2d at 947 (emphasis in original).

CONCLUSION

For all of the above reasons and for the reasons set forth in respondents' brief, the order of the Court of Appeals should be affirmed.

Dated: Albany, New York
January 5, 1994

Respectfully submitted,

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APPENDIX — Complaint in *The State of New York, et al., v. The Defense Base Closure and Realignment Commission, et al.*, 93-CV-1525 (N.D.N.Y.) (TJM)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK; MARIO M. CUOMO, as Governor of the State of New York; JOHN M. MCHUGH, as United States Congressman from the 24th Congressional District of New York State; RONALD B. STAFFORD, as a Member of the New York State Senate, Representing the 45th Senate District of New York State, GEORGE CHRISTIAN ORTLOFF, as a Member of the New York State Assembly, Representing the 110th Assembly District of New York State; CLYDE RABIDEAU, as Mayor of the City of Plattsburgh, New York; THE CITY OF PLATTSBURGH, NEW YORK; ARTHUR LEFEVRE, as Supervisor of the Town of Plattsburgh, New York; THE TOWN OF PLATTSBURGH, NEW YORK; WILLIAM BINGEL, as County Administrator of the County of Clinton, New York; THE COUNTY OF CLINTON, NEW YORK; JOHN J. DUFFY, as President of Local # 3735 of the American Federation of Government Employees; LOCAL # 3735 OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; JOHN J. DUFFY; BRIAN F. STONE, PHILLIP SPRAGUE, GIRARD F. CURTIS, JOHN BRYANT, JOHN WALLACE, and CLARENCE J. JEFFERIES,

Plaintiffs,

against

THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS: JAMES A. COURTER, CAPTAIN PETER B. BOWMAN, USN (RET.), BEVERLY B. BYRON, REBECCA G. COX, GENERAL H.T. JOHNSON, USAF (RET.), HARRY C. MCPHERSON, JR., AND ROBERT D. STUART, JR.; LES ASPIN, as United States Secretary of Defense; and SHEILA WIDNALL, as United States Secretary of the Air Force;

Defendants.

CV

Plaintiffs, by their attorneys, for their complaint against the defendants, allege:

PRELIMINARY STATEMENT

1. This lawsuit is brought to prevent the illegal and unprecedented attempt by the Defense Base Closure and Realignment Commission to replace the United States Department of Defense as the principal architect of American defense policy. In essence, the Commission, for the very first time, closed a military base (Plattsburgh Air Force Base) against the advice of, and without the required statutory input from both the United States Air Force and the United States Department of Defense, which both found that the continued functioning of this Base was central to the adequacy of the military preparedness of this nation. The recommendation by the Commission to close Plattsburgh Air Force Base is an action not only in violation of the

limited powers granted to the Commission by the Defense Base Closure and Realignment Act of 1990, but also one which has the potential of undermining the effectiveness of the defense of the United States. The Commission's actions challenged in this case, if allowed to stand, would establish a dangerous precedent allowing the Commission to ignore both the Air Force, the Department of Defense and the statutory limitations which are part of the process of closing military bases under the statute in issue.

2. More specifically, this is a civil action for a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring and adjudging as void, illegal, and of no force and effect, the recommendation of the Defense Base Closure and Realignment Commission ("the Commission") to the President of the United States, ("the President") dated July 1, 1993, to close Plattsburgh Air Force Base, in Plattsburgh, New York, (the only active duty U.S. Air Force Base located east of the State of Ohio and North of the State of New Jersey), and the approval of the aforesaid Commission's recommendation by the President. Such judgment is sought upon the ground that the Commission in making the aforesaid recommendation, exceeded their authority under the Defense Base Closure and Realignment Act of 1990 (Public Law No. 101-510, Title XXIX, §§ 2901-2910, November 5, 1990) ("the Act"), because the Commission recommended that Plattsburgh be closed in the absence of any recommendation by the Secretary regarding the closure or realignment of the Base, and the Commission rejected the decision of Les Aspin, as United States Secretary of Defense, to keep Plattsburgh Air Force Base open, when there was no substantial deviation by the Secretary from his force structure plan and final criteria (used in identifying bases for closure or realignment) in the rendering of his recom-

mendation; and the President's approval of the closure of Plattsburgh Air Force Base was made after the submission to him of the Commission's recommendation for such closure, which recommendation was not made in accordance with the requirements of the Act. This action is further brought to obtain an injunction enjoining Les Aspin, as United States Secretary of Defense ("the Secretary"), Sheila Widnall, as United States Secretary of the Air Force, and their agents and employees, from taking any action to close Plattsburgh Air Force Base, predicated upon the approval of the President of the Commission's recommendation to close the Base and to further enjoin them from taking any action to make McGuire Air Force Base the home base of the East Coast Air Mobility Wing.

PARTIES

3. Plaintiff, the State of New York ("New York"), is a sovereign State of the United States of America, which includes within its boundaries Plattsburgh Air Force Base, in Plattsburgh, New York, and the geographic area covered by the United States District Court for the Northern District of New York.

4. Plaintiff, Mario M. Cuomo, is a citizen of the State of New York, and its duly elected and serving Governor, with his principal office located in the City and County of Albany and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

5. Plaintiff, John M. McHugh, is a citizen of the State of New York, and the duly elected and serving United States

Congressman from the 24th Congressional District of New York, with offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

6. Plaintiff, Clyde Rabideau, is a citizen of the State of New York, and the duly elected and serving Mayor of the City of Plattsburgh, New York, with offices in the City of Plattsburgh, New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

7. Plaintiff, the City of Plattsburgh, New York, is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Northern District of New York, and includes within its boundaries portions of Plattsburgh Air Force Base.

8. Plaintiff, Arthur LeFevre, is a citizen of the State of New York, and the duly elected and serving Supervisor of the Town of Plattsburgh, New York, who resides and has offices in the Town of Plattsburgh, New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

9. Plaintiff, the Town of Plattsburgh, New York, is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Northern District of New York, and includes within its boundaries portions of Plattsburgh Air Force Base.

10. Plaintiff, William Bingel, is a citizen of the State of New York, and the duly appointed and serving County Administrator of the County of Clinton, New York, who resides and has offices in the County of Clinton, New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

11. Plaintiff, the County of Clinton, New York, is a political subdivision of the State of New York, located within the geographic area covered by the United States District Court for the Northern District of New York, and includes within its boundaries all of Plattsburgh Air Force Base.

12. Plaintiff, Ronald B. Stafford, is a citizen of the State of New York, and the duly elected and serving member of the Senate, representing the 45th Senate District of New York State, with offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

13. Plaintiff, George Christian Ortloff, is a citizen of the State of New York, and the duly elected and serving member of the Assembly, representing the 110th Assembly District of New York State, with offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

14. Plaintiff, John J. Duffy, is the president of the plaintiff, Union Local No. 3735 of the American Federation of Government Employees, and resides in the County of Clinton and the State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

15. Plaintiff, Union Local No. 3735 of the American Federation of Government Employees, is an unincorporated labor organization recognized and certified by the Federal Labor Relations Authority, under the Civil Service Reform Act of 1978 (5 U.S.C. § 7101 *et. seq.*), with principal offices located in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

16. Plaintiff, Union Local No. 3735 of the American Federation of Government Employees, is the exclusive bargaining representative for approximately one-half or 250 of the total number of civilian employees of Plattsburgh Air Force Base, who perform in such capacities as welders, carpenters, vehicle mechanics, snow plow drivers, secretaries, clerks, groundskeepers and warehouse personnel.

17. Plaintiffs, John J. Duffy, Brian F. Stone, Phillip Sprague, Girard F. Curtis, John Bryant, John Wallace, and Clarence J. Jefferies are members of the aforesaid Union, and civilians employed at the Plattsburgh Air Force Base, who reside in the County of Clinton and State of New York, which is within the judicial district covered by the United States District Court for the Northern District of New York.

18. Plaintiff, John J. Duffy is a welder who has been a member of the aforesaid Union for 5 1/2 years, employed at Plattsburgh Air Force Base for 6 1/2 years, and employed by the Federal Government for 20 years. Plaintiff, Brian Stone is a quality assurance technician who has been a member of the aforesaid Union for 4 1/2 years, and employed at Plattsburgh Air Force Base for 5 years. Plaintiff, Phillip Sprague is an air field cleaner and equipment operator who has been a member of the aforesaid Union for 5 years, and employed at Plattsburgh Air Force Base for 9 years. Plaintiff Gerald F. Curtis is an electrician who has been a member of the aforesaid Union for 10 years, and employed at Plattsburgh Air Force Base for 20 years. Plaintiff, John Bryant is a mechanic who has been a member of the aforesaid Union for 5 years, and employed at Plattsburgh Air Force Base for 5 years. Plaintiff, John Wallace is a supply clerk who has been a member of the aforesaid Union for 4 years, employed at Plattsburgh Air Force Base for 10 years, and was a member of the military for 21 years. Plaintiff, Clarence J. Jefferies is a supply clerk who has been a member of the aforesaid Union for 5 years, employed at Plattsburgh Air Force Base for 7 years, and was a member of the military for 24 years.

19. Defendant, the Defense Base Closure and Realignment Commission, ("the Commission") is an independent commission created under § 2902(a) of the Act, which is charged with primary responsibilities thereunder, including insuring an independent, equal, lawful and fair process for closing and realigning military installations.

20. Defendant, James A. Courter, is the duly appointed and serving chairman of the Commission, and defendants Captain Peter B. Bowman, USN (ret.) Beverly B. Byron, Rebecca G. Cox, General H.T. Johnson, USAF (ret.), Harry

C. McPherson, Jr. and Robert D. Stuart, Jr. are duly appointed and serving members of the Commission.

21. Defendant, Les Aspin, is the duly appointed and serving United States Secretary of Defense, whose responsibilities include oversight of the military forces and formulation of the defense policy of the United States, and whose principal offices are located at the Pentagon, Washington, D.C.

22. Defendant, Sheila Widnall, is the duly appointed and serving United States Secretary of the Air Force, whose responsibilities include oversight of Plattsburgh Air Force Base in Plattsburgh, New York, and whose principal offices are located at the Department of the Air Force, the Pentagon, Washington, D.C.

23. Each of the defendants holding the offices indicated are sued in their official capacities only.

24. All of the above-mentioned plaintiffs representing the State of New York and its various political subdivisions, would be immediately, substantially and irreparably harmed by the closure of Plattsburgh Air Force Base, by virtue of representing political subdivisions and citizens which, for the reasons stated herein, will suffer immediate, substantial, and irreparable economic hardships from such a closure.

25. Plaintiff, the State of New York, would also be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base because:

- a) the 174th Fighter Wing of the New York State Air National Guard at Syracuse, New York, uses for its training exercises refueling tankers from Plattsburgh Air Force Base;
- b) Plattsburgh Air Force Base is a weather divert base to which the 174th Fighter Wing proceeds in the event of inclement weather conditions;
- c) Plattsburgh Air Force Base is an emergency recovery base for the 174th Fighter Wing, to which fighters proceed in the event of problems encountered in the air;
- d) The 105th and 109th Air Lift Groups of the New York State Air National Guard at Syracuse, New York use Plattsburgh Air Force Base for air crew proficiency training (approaches and landings);
- e) The 106th Rescue Group of the New York State Air National Guard at Syracuse, New York uses Plattsburgh Air Force Base for water training, requiring the proximity of fresh water to an air force base.

The closing of Plattsburgh Air Force Base would pose significant problems to the conduct of the aforesaid training exercises, negatively affecting the military readiness of plaintiff, the State of New York.

26. Plaintiff, the City of Plattsburgh, New York, would be immediately, substantially and irreparably harmed by the closure of Plattsburgh Air Force Base, because it supplies the Base with sewer, water, and electrical services, and

would thereby lose substantial revenues from the decrease in demand for these services, and be forced to increase rates for these services to residents of the City. In addition, the closure of the Base would cause the loss of substantial City sales tax revenues, and the loss of significant numbers of jobs connected both directly and indirectly to the Base, thereby substantially increasing the City's unemployment rate. Furthermore, military contracts for base construction and updating of base facilities have been terminated, and future contracts will not be let, causing the loss of hundreds of construction-related jobs, with the resultant destabilization of the local economy. The sudden vacancy of the Base real property would decrease property values, resulting in increased real property taxes for City property owners, and until the Base property is sold would further result in discouraging new construction which would lead to a higher than normal rate of unemployment in the building trades and decreased sales of building supply materials. Until the Base property is sold, its holding costs would shift to the City, resulting in a substantial cost burden on City taxpayers, which burden would include the costs of needed increased police and fire protection. All of the foregoing consequences would result in a severe impact upon the City's budget and ability to provide needed services to its other residents.

27. Plaintiff, the Town of Plattsburgh, New York, would be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base because of the substantial shrinkage and negative impact upon its economy which would be caused by the loss of approximately 3,000 jobs from the closure of Plattsburgh Air Force Base. In addition, the closure of the Base would cause the loss of substantial sales tax revenues. Furthermore, military con-

tracts for base construction and updating of base facilities have been terminated, and future contracts will not be let, causing the loss of hundreds of construction-related jobs, with the resultant destabilization of the local economy. All of the foregoing consequences would result in a severe impact upon the Town's budget and ability to provide needed services to its other residents.

28. Plaintiff, the County of Clinton, New York, would be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base because of the substantial shrinkage and negative impact upon its economy which would be caused by the loss of approximately 3,000 jobs from the closure of Plattsburgh Air Force Base. In addition, the closure of the Base would cause the loss of substantial sales tax revenues. Furthermore, military contracts for base construction and updating of base facilities have been terminated, and future contracts will not be let, causing the loss of hundreds of construction-related jobs, with the resultant destabilization of the local economy. All of the foregoing consequences would result in a severe impact upon the County's budget and ability to provide needed services to its other residents. In addition, the County would be immediately, substantially and irreparably harmed by the loss of substantial tipping fees paid by Plattsburgh Air Force Base relating to solid waste disposal, as such tipping fees covered the cost of the large County-owned facilities which were enhanced in size because of the use made of them by the Base.

29. Plaintiff, Local Union No. 3735 of the American Federation of Government Employees would be immediately, substantially, and irreparably harmed by the closure of Plattsburgh Air Force Base as a result of all its members

losing their jobs at the Base. Significant numbers of its members would experience difficulty reentering the labor force without substantial retraining.

30. Plaintiffs, John J. Duffy, Brian F. Stone, Phillip Sprague, Girard F. Curtis, John Bryant, John Wallace, and Clarence J. Jefferies would be immediately, substantially and irreparably harmed by the closure of Plattsburgh Air Force Base by the loss of their jobs on the Base, and in addition, plaintiff, John J. Duffy, would also be similarly harmed by virtue of representing the aforesaid Union, all of whose members would lose their jobs as a result of the closure of the Base.

JURISDICTION

31. The claims of plaintiffs are founded upon, and jurisdiction of this action is maintained under 28 U.S.C. §§ 1331 (existence of a federal question), 1337, 1346(a)(2), 1361, the Defense Base Closure and Realignment Act of 1990 (Public Law No. 101-510, Title XXIX, §§ 2901-2910, November 5, 1990), the Administrative Procedure Act (5 U.S.C. 701 *et. seq.*), and common law principles of judicial review and the separation of powers. A declaratory judgment and further relief nullifying the aforesaid recommendations of the Commission and the President, and obtaining injunctive relief are appropriate under 28 U.S.C. §§ 2201 and 2202.

VENUE

32. Venue of this action in the Northern District of New York is proper under 28 U.S.C. §§ 1391(b) and (e), and 1402(a)(1).

DEFENSE BASE CLOSURE AND REALIGNMENT
ACT OF 1990

33. The Act's purpose is "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." § 2901(b).

34. The Act creates an independent commission, denominated the "Defense Base Closure and Realignment Commission", which is appointed by the President of the United States with the advice and consent of the United States Senate. § 2902(a).

35. The Secretary is obligated to provide the United States Congress and the Commission with a six year "force structure plan" for the United States Armed Forces that assesses national security threats and the force structure needed to meet them. § 2903(a)(1)-(2).

36. The Act also requires the Secretary to formulate criteria for use in identifying bases for closure or realignment. These criteria are required to be published in the Federal Register for public notice and comment, and are further required to be submitted to the United States Congress for evaluation and approval. § 2903(b).

37. In order to initiate the base closure and realignment procedure, the Secretary must recommend base closures and realignments by April 15 of the year in issue, and such recommendations must be predicated upon the aforesaid force structure plan and final criteria. § 2903(c)(1).

38. The Commission must then review these recommendations, and prepare a report for the President containing its review and analysis of the Secretary's proposals and the Commission's recommendations for base closures and realignments. § 2903(d)(2).

39. The Act requires the Commission to hold public hearings on the Secretary's recommendations. § 2903(d)(1).

40. Sections 2903(d)(2)(B) of the Act provides that "the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force structure plan and final criteria referred to in subsection (c)(1) in making recommendations."

41. Sections 2903(d)(2)(C) & (D) of the Act provide that the Commission may add a military installation to the list of military installations recommended by the Secretary for closure or realignment "only if," among other requirements, the Commission makes the determinations required by § 2903(d)(2)(B) that the Secretary deviated substantially from the force structure plan and final criteria, and "publishes notice of the proposed change in the Federal Register not less than 30 days before transmitting its recommendations to the President. . . ."

42. The Commission's report to the President must explain and justify any departure from the Secretary's list of recommendations. § 2903(d)(3).

43. After the Commission has made its recommendations, the Act requires that by July 1 of the year in issue they be presented to the President for his review. § 2903(d)(2)(A).

44. The President may approve the Commission's recommendations, or disapprove them, in whole or in part, and must transmit his determination to the Commission and the United States Congress. § 2903(e)(2)-(3).

45. If the President approves the recommendations of the Commission, the United States Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the Commission's recommendations in their entirety. §§ 2904(b), 2908.

46. If such a Congressional disapproval resolution is enacted, the Secretary may not close the bases approved for closure by the President. § 2904(b).

47. If the President disapproves the Commission's recommendations, in whole or in part, he returns them to the Commission. The Commission then reconsiders its recommendations in view of the President's actions, and resubmits a revised list for the President's consideration by August 15. § 2903(e)(3).

48. If the President does not send to the U.S. Congress an approved list of recommendations (in the form in which it is

returned by the Commission) by September 1st of the year in which the Commission has transmitted such recommendations to the President, the base closure process for that year is terminated. § 2903(e)(5).

BACKGROUND

49. On February 15, 1991, the Secretary, pursuant to the Act, published in the Federal Register, for public notice and comment, the criteria used by him in identifying bases for closure or realignment. § 2903(b).

50. On or about February 15, 1991, these criteria were presented to the United States Congress which evaluated and approved them on or about March 15, 1991, as required by the Act. § 2903(b).

51. In December, 1992, the Secretary announced that the final criteria to be used in 1993 would be identical to those used in 1991.

52. On March 12, 1993, the Secretary provided the United States Congress and the Commission with a six year force structure plan assessing national security threats and the force structure needed to meet them for the years 1994 through 1999. § 2903(a)(1)-(2).

53. On March 15, 1993, the Secretary, pursuant to the Act, recommended base closures and realignments to the Commission based upon the aforesaid force structure plan and final criteria used in identifying bases for closure or realignment. § 2903(c)(1).

54. In his recommendations, the Secretary did not recommend Plattsburgh Air Force Base for either realignment or closure, having previously determined that Plattsburgh Air Force Base would, for the proper defense of the nation, remain open as the east coast home base of one of two newly-conceived composite units called Air Mobility Wings. In fact, the Secretary, in its March 15, 1993, recommendations stated the following as its justification for the realignment of McGuire Air Force Base:

The Air Force plans to establish a large mobility base in the Northeast to support the new Major Regional Contingency (MRC) strategy. McGuire was evaluated specifically as the location for this wing, along with other bases that met the geographical criteria and were available for this mission: Griffis AFB, New York and Plattsburgh AFB, New York. Plattsburgh AFB ranked best in capability to support the air mobility wing due to its geographical location, attributes, and base loading capacity. Principal mobility attributes include aircraft parking space (for 70-80 tanker/airlift aircraft), fuel hydrants and fuel supply/storage capacity, along with present and future encroachment and airspace considerations.

When Plattsburgh AFB was compared directly with McGuire AFB, Plattsburgh AFB rated better in all of the mobility attributes. An air mobility wing at Plattsburgh AFB will eliminate many of the problems associated with operating at McGuire AFB, in the midst of the New York/New Jersey air traffic congestion. Basing the additional aircraft of an air mobility wing at McGuire AFB will add to that congestion. Plattsburgh AFB, on the other hand, has

ample airspace for present and future training by an air mobility wing. Also, the FAA has long expressed a desire for civil use of McGuire AFB, which will ease the congestion at other airfields and terminal facilities in the New York and Philadelphia metropolitan areas. For these reasons, McGuire AFB was recommended for realignment and conversion to an Air Force Reserve Base.

55. The Secretary's decision to retain Plattsburgh Air Force Base as the home of the East Coast Air Mobility Wing was determined to be consistent with the force structure plan and final criteria based upon an analysis of 160 separate factors which were formulated by the United States Air Force.

56. This discussion of Plattsburgh Air Force Base by the Secretary as part of the recommendation regarding McGuire Air Force Base was necessary since the location of the East Coast Air Mobility Wing at Plattsburgh Air Force Base played a key role in determining the Secretary's recommendations regarding realignment of McGuire Air Force Base.

57. Since the discussion of Plattsburgh Air Force Base by the Secretary was not in the form of a separate recommendation for either closure or realignment, but only in the context of the recommendation regarding disposition of McGuire Air Force Base, such discussion was confined solely and exclusively to the only relevant factor therein--the air mobility wing. In other words, there was no discussion by the Secretary of other needed military uses of Plattsburgh, if it were not to serve as home of the East Coast Air Mobility Wing.

58. Notwithstanding the Secretary's designation of Plattsburgh Air Force Base as the location of the East Coast Mobility Wing, on June 1, 1993, the Commission published a notice in the Federal Register purporting to add Plattsburgh Air Force Base, among other military installations, to the list the Commission would "consider as proposed additions to the Secretary of Defense's March, 1993 list of military installations recommended for closure or realignment." The Commission made no findings of substantial deviation before adding Plattsburgh to the list of military installations, nor did the Commission explain its additions in any manner whatsoever.

59. The Commission held hearings to consider and discuss the Secretary's recommendations as well as the additional military installations purportedly added by the Commission. In addition, the Commission requested its staff to analyze the recommendations of the Secretary, as well as various "scenarios" not recommended by the Secretary of Defense. Several of these "scenarios" focussed on the question of which base should, in the opinion of the Commission, be the base of the East Coast Air Mobility Wing, notwithstanding that the Secretary had made this determination and had made no recommendation to the Commission regarding Plattsburgh Air Force Base.

60. On June 24, 1993, after consideration by the Commission of various comparisons of McGuire, Griffis and Plattsburgh Air Force Bases for compatibility for the Air Mobility Wing mission, Commissioner Johnson made a motion relating to the Secretary's recommendation to realign McGuire Air Force Base. Commissioner Johnson prefaced his statement by brief remarks explaining why he believed that "McGuire is the proper base for an East Coast Mobility

base." His remarks focussed primarily on the location of McGuire and did not mention any basis for a conclusion that the Secretary in choosing Plattsburgh as the Mobility Wing location had substantially deviated from the force structure plan and the final criteria.

61. In response to Commissioner Johnson's remarks regarding his opinion of the proper base for the Air Mobility Wing mission, Commissioner Byron noted that the Act requires substantial deviation before the Commission can change a recommendation of the Secretary. She noted that even under the Commission's own staff analysis of the three bases, McGuire did not come in at the top of the list for the Air Mobility Wing mission. She stated that the case for substantial deviation had not been made on the record before the Commission.

62. Notwithstanding Commissioner Byron's comments, Commissioner Johnson made a motion to the effect that the Secretary's recommendation to realign McGuire substantially deviated from the final criteria 1, 2, 3, and 4, that McGuire be retained as an active installation, and that McGuire be established as the East Coast Air Mobility Wing Base. The motion did not state that the Commission found that the Secretary's recommendation substantially deviated from the force structure plan, nor could any such finding have been based upon the evidence presented to the Commission. The motion was passed by the Commission by a vote of 6-1.

63. The record of the public hearings held by the Commission in Washington D.C. during June, 1993, indicates that no significant information was presented to the Commission which supported the closing of Plattsburgh Air

Force Base, much less a demonstration that the Secretary's decision to keep it open deviated substantially from the force structure plan and final criteria. Rather, the record contains explicit acknowledgments by the Commission and its staff that Plattsburgh was well suited to the Air Mobility Wing Mission. Commissioner Johnson, when he made his motion to make McGuire the Air Mobility Wing Base, stated that "Plattsburgh has the best facilities," "Plattsburgh has, by far, the largest" ramp, both Plattsburgh and Griffis "have relatively less [air] congestion."

64. The primary basis offered by Commissioner Johnson for his motion designating McGuire as the East Coast Mobility Wing Base was its location near "customers." This was reiterated and confirmed by remarks made by Commissioners Johnson and Courter after the vote. However, the Air Force plainly considered the location of the three bases, Griffis, McGuire and Plattsburgh in making its determination. The location of McGuire was considered not appropriate for the Air Mobility Wing mission because of air congestion. While the Commission acknowledged the air congestion near McGuire, and that there was no such congestion near Plattsburgh, the Commission determined that the Mobility Wing mission could still be accommodated at McGuire. The Commission, however, failed to demonstrate how the Secretary deviated substantially from the final criteria in determining that Plattsburgh should be the East Coast Mobility Base.

65. Following this vote, and following further discussion regarding other Air Force Bases, none of which focussed on any substantial deviation of the Secretary with respect to Plattsburgh Air Force Base, Commissioner McPherson made the following motion with respect to Plattsburgh Air Force Base:

I move that the Commission find that the Secretary of Defense deviated substantially from Criteria 2 and 4 and, therefore, that the Commission adopt the following recommendation:

Close Plattsburgh Air Force Base and transfer the KC-135s to McGuire Air Force Base. The Commission finds that this recommendation is consistent with the force structure plan and final criteria.

The motion did not state that the Secretary's recommendation regarding Plattsburgh Air Force deviated substantially from the force structure plan, nor could any such finding have been made based upon the evidence presented by the Commission. Indeed, the Secretary had made no recommendation regarding closure or realignment of Plattsburgh Air Force Base. The motion was passed by a vote of 6-1.

66. On July 1, 1993, the Commission delivered a written report to the President containing its assessment of the Secretary's proposals and its own recommendations for base closures, which included the recommendation that Plattsburgh Air Force Base be closed. § 2903(d)(2). The report contained purported justifications and findings not offered by the Commission or its members at the time of the vote on the motions discussed above, and not based on the record before the Commission.

67. The Commission's report recommending to the President that the Base be closed constitutes the very first time under this Act that the Commission recommended the closure of a major base which the Secretary recommended to remain open.

68. On July 2, 1993, the President approved the recommendations of the Commission, and transmitted his approval to the Commission and the U.S. Congress. § 2903 (e)(2)-(3)

69. As a result of the failure of the U.S. Congress to disapprove of the Commission's recommendations, the Secretary purports to be authorized to proceed with the closing and realignment of the military bases designated by the Commission's recommendations, including the closing of Plattsburgh Air Force Base.

FIRST CLAIM FOR RELIEF

70. Plaintiffs repeat and reallege each and every one of the allegations set forth in ¶¶ 1-69, inclusive, with the same force and effect as if fully set forth at length herein.

71. There is now existing between the parties hereto an actual controversy in respect to which plaintiffs are entitled to have a declaration of their rights, and further relief because of the facts, conditions, and circumstances as set forth in this complaint.

72. If the Secretary makes no recommendation under the Act to close or realign a particular military base, the Commission has no authority to change the status of that base

because of the absence of any standard against which the Commission can measure its authority to make such a change, since the Act only allows the Commission to change recommendations of the Secretary which deviate substantially from the force structure plan and final criteria.

73. The Act states that the findings and conclusions of the Commission's report to the President must be "based on a review and analysis of the recommendations made by the Secretary." § 2903 (d)(2)(A). In addition, the Act requires the Commission to explain and justify any of its recommendations which differ from those of the Secretary. § 2903(d)(3).

74. The only military bases which are subject to closure or realignment by the Commission under the Act are those military bases which the Secretary specifically chooses to make the subject of his recommendations to the Commission.

75. On page I-76 of its report to the President, the Commission expressly acknowledged that the Secretary had issued no recommendation regarding Plattsburgh Air Force Base, through its recitation of the word "None" under the heading of DEPARTMENT OF DEFENSE RECOMMENDATION for Plattsburgh Air Force Base.

76. The Secretary did not have the opportunity to present to the Commission a position concerning other needed military uses of Plattsburgh Air Force Base, if it were not to be the home of the East Coast Air Mobility Wing, because such a discussion was not necessary or required by the Act since

Plattsburgh Air Force Base was not recommended to be closed or realigned by the Secretary.

77. The Commission's decision to close Plattsburgh Air Force Base without any input from the Secretary concerning other needed military uses of the Base if it were not to be used as home of the East Coast Air Mobility Wing constitutes a usurpation by the Commission of the Secretary's authority to establish the defense policy of the United States.

78. The Commission had no authority to close Plattsburgh Air Force Base, since there was no recommendation by the Secretary (to close or realign Plattsburgh) against which it could determine (as required by the Act) the presence of a substantial deviation by the Secretary from the force structure plan and final criteria.

79. As a result, the Commission's recommendation to close Plattsburgh Air Force Base was in excess of its authority under the Act, since it was not based upon a recommendation from the Secretary which deviated substantially from the force structure plan and final criteria.

80. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

81. Plaintiffs have no prompt, adequate and effective remedy at law, and this action is the only available means to them to secure the protection of their rights.

82. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

SECOND CLAIM FOR RELIEF

83. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-82 inclusive of this complaint with the same force and effect as if fully set forth at length herein.

84. Before placing Plattsburgh Air Force Base on its list of military bases recommended for closure, the Commission must first demonstrate that the Secretary deviated substantially from the force structure plan and final criteria in retaining Plattsburgh Air Force Base as the proposed home of the East Coast Mobility Wing. § 2903(d)(C).

85. On June 1, 1993, the Commission improperly placed Plattsburgh Air Force Base on its closure list without first having demonstrated that it met the aforesaid substantial deviation standard as required by the Act.

86. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, the Commission had failed to demonstrate such substantial deviation, which was not in compliance with the dictates of the Act.

87. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

THIRD CLAIM FOR RELIEF

88. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-87 inclusive of this complaint with the same force and effect as if fully set forth at length herein. Each allegation of this claim assumes, without conceding, that the Secretary issued to the Commission a "rec-

ommendation" regarding Plattsburgh Air Force Base that was reviewable by the Commission.

89. The Commission is authorized to change such recommendations of the Secretary only if they "deviate [] substantially" from the force structure plan *and* the final criteria, and the Commission both explains and justifies in its report to the President the changing of such a recommendation. §§ 2903(d)(2)(B), 2903(d)(3).

90. Neither the Commission's motion of June 24, 1993, nor the Commission's report to the President of July 1, 1993, recited, explained or demonstrated how the Secretary's recommendation with respect to Plattsburgh Air Force Base deviated substantially from the force structure plan, as explicitly required by the Act.

91. The Commission's report to the President did not, as required by the Act, "explain and justify" its departure from the Secretary's recommendation to keep Plattsburgh Air Force Base open. § 2903(d)(3).

92. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

93. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring

and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

FOURTH CLAIM FOR RELIEF

94. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-93 inclusive of this complaint with the same force and effect as if fully set forth at length herein.

95. In making its recommendation to close Plattsburgh Air Force Base, the Commission not only failed to comply with, but totally ignored the substantial deviation standard of the Act which it was required to satisfy in order to justify overriding the determination by the Secretary to retain Plattsburgh Air Force Base as the home of the East Coast Mobility Wing.

96. The Secretary's decision to retain Plattsburgh Air Force Base as the home of the East Coast Air Mobility Wing was determined to be consistent with the force structure plan and final criteria based upon an analysis of 160 separate factors which were formulated by the United States Air Force.

97. The Commission made no finding either at the time of its motion on June 24, 1993 or in its written report, that the designation of Plattsburgh as the East Coast Air Mobility Wing Base deviated substantially from the force structure plan. This failure alone justifies the relief sought by plaintiffs since such a finding is an absolute prerequisite to the action taken by the Commission.

98. The Commission did state that the Secretary's findings regarding Plattsburgh Air Force Base substantially deviated from the final criteria, in spite of the fact that the Commission agreed with the findings of the Secretary on virtually all criteria identified by the Air Force as relevant to the location of the Air Mobility Wing as the Mobility Wing concept was developed by the Air Force.

99. The criterion regarding the closeness of Plattsburgh Air Force Base to customers and to on load points is not central to the concept of the Air Mobility Wing developed by the Air Force, being central only to a traditional airlift function.

100. As a result, by employing the criterion regarding the closeness to customers, the Commission ignored the Secretary's decision to establish an Air Mobility Wing in place of the traditional airlift function for Plattsburgh Air Force Base, and completely distorted the concept as developed by the Air Force and the Secretary.

101. As a result of ignoring the Secretary's decision to establish an Air Mobility Wing in place of a traditional airlift function, and/or determining that location based on traditional airlift considerations should be the predominant

factor, and recommending the closure of Plattsburgh Air Force Base predicated upon factors associated with the airlift function, the Commission, in excess of its authority, substituted its own views for that of the Secretary of Defense and established defense policy for the United States, when its only proper function under the Act was to determine if the Secretary's defense policy recommendations were consistent with the force structure plan and final criteria.

102. The Commission improperly applied cost-related data to the methods of cost analysis which it utilized in determining which base should serve as home of the East Coast Air Mobility Wing, and otherwise improperly utilized such methods of cost analysis, resulting in the erroneous finding that Plattsburgh Air Force Base would be more costly than McGuire Air Force Base as the designated home of the air mobility wing.

103. The Commission's written report purported to provide justification and "findings" for the Commission's actions that were not set forth by the Commission at the time it voted on the motions to make McGuire the Air Mobility Base and to close Plattsburgh. These subsequent findings, either singly or together, do not support a finding of substantial deviation from the force structure plan or the final criteria. They amount only to a mere recitation of factors of relatively minor significance, if any, to the Air Mobility Wing concept as designed and described by the Air Force. Further, the recitation simply ignores the major relevant factors as to which the Secretary and the Commission staff agreed supporting the conclusion that Plattsburgh was the best base for the Mobility Mission.

104. As a result of the foregoing, it is clear that the Commission not only failed to comply with, but totally ignored the substantial deviation standard set forth in the Act as an express limitation on its actions, substituted its judgment for that of Secretary on matters of defense policy, and thereby exceeded its authority under the Act by virtue of recommending the closure of Plattsburgh Air Force Base.

105. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

106. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

FIFTH CLAIM FOR RELIEF

107. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-106 inclusive of this complaint with

the same force and effect as if fully set forth at length herein.

108. The Act requires that the Commission publish in the Federal Register any changes it proposes to make to the recommendations of the Secretary not less than 30 days before transmitting its recommendations to the President. § 2903 (d)(2)(C)(iii).

109. The Commission published in the Federal Register its notice that it intended to consider recommending the closure or realignment of Plattsburgh Air Force Base on June 1, 1993. The Commission transmitted its report to the President on July 1, 1993.

110. Plaintiffs maintain that the Commission had no authority to add Plattsburgh Air Force Base to the list of military installations because the Secretary submitted no recommendation with respect to Plattsburgh to the Commission, and because the Commission made no finding of substantial deviation from the force structure plan and final criteria before adding Plattsburgh. But if the Act is construed to allow the Commission to add Plattsburgh Air Force Base to the list, then as a result of the foregoing, the Commission violated the Act by its untimely publication in the Federal Register only 29 days before the transmission of its report to the President, resulting in the invalidity of its recommendation to close Plattsburgh Air Force Base, and the President's subsequent approval of that recommendation.

111. As a result of the foregoing, both the Commission and the President exceeded their power and authority under

the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

SIXTH CLAIM FOR RELIEF

112. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-111 inclusive of this complaint with the same force and effect as if fully set forth at length herein.

113. In order to assure a fair procedure for base closing, the Act requires that the President be presented with balanced and informed advice before either approving or disapproving the Commission's recommendations regarding the closure or realignment of military bases. Such balanced and informed advice is to include Commission recommendations which are in accord with the Act's dictates that the Commission may change a recommendation of the Secretary regarding base closures only if: that recommendation substantially deviates from the force structure plan and final criteria; the Commission both explains and justifies in its report to the President the changing of such a recommendation; and the Commission's recommended closure is published in a timely fashion in the Federal Register.

114. The presentation to the President of a Commission recommendation advocating the closure of Plattsburgh Air Force Base which was not in compliance with the aforesaid statutory directives undermines the aforesaid purpose and intent of the Act to assure that both the President and Congress have access to balanced and informed advice before rendering any decision under the Act to close or realign military bases.

115. The President did not have statutory authority to render a decision either approving or disapproving the Commission's recommendation regarding the closure of Plattsburgh Air Force Base, because the Commission's recommendation, which the President received before making such a decision, was not in compliance with the aforesaid dictates of the Act.

116. The action of the President in approving the closure of Plattsburgh Air Force Base, after receipt of the improperly prepared Commission recommendation, constitutes an action in violation of delegated executive authority to the President under the Act, resulting not only in the invalidity of the Commission's recommendation, but also the President's subsequent approval of it.

117. As a result of the foregoing, both the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secre-

tary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect.

SEVENTH CLAIM FOR RELIEF

118. Plaintiffs repeat and reallege each and every allegation contained in ¶ 1-117, inclusive, of this complaint, with the same force and effect as if fully set forth at length herein.

119. The requirement of the Act that the Commission may not change the recommendations of the Secretary concerning base closure unless they deviate substantially from the force structure plan and final criteria, constitutes an explicit substantive and procedural limitation upon the Commission's authority to change the Secretary's recommendations whether a particular military base should be closed or realigned, and such limitation is intended for the benefit of the plaintiffs herein.

120. The action of the Commission in deciding to close Plattsburgh Air Force Base, despite the absence of a recommendation of the Secretary, (or at most a contrary recommendation of the Secretary) constitutes an action which ignored this statutory requirement, and was, therefore, in excess of the Commission's authority under the Act.

121. Compliance by the Commission with this statutory requirement would necessarily have caused the Commission and the President to have followed the recommendation of the Secretary to keep Plattsburgh Air Force Base open.

122. Pursuant to the Act, the President has the discretion to accept or reject in its entirety the recommendations of the Commission regarding base closure or realignment.

123. In order to assure a fair procedure for base closing, the Act requires that the President be presented with balanced and informed advice before approving or disapproving the Commission's recommendations. Such balanced and informed advice is to include Commission recommendations which are in accord with the Act's dictates that the Commission may only change a recommendation of the Secretary regarding whether a base is to be closed or realigned which substantially deviates from the force structure plan and final criteria.

124. The presentation to the President of recommendations of the Commission not in compliance with this statutory directive undermines the purpose and intent of the Act to assure that both the President and Congress have access to balanced and informed advice before rendering any decision under the Act to close or realign military bases.

125. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

126. The Act entitles plaintiffs to a fair process in the determination of which bases should be closed or realigned.

127. The Act entitles plaintiffs to have Plattsburgh Air Force Base remain open and in operation, unless and until it is determined in accordance with the Act that the closure is warranted.

128. Each of the plaintiffs, for the reasons stated hereinabove, have a property interest in the continued operation of Plattsburgh Air Force Base.

129. The failure to comply with the procedures and substantive limitations set forth in the Act, as described hereinabove, illegally interferes with rights granted to the plaintiffs under the Act, and constitutes a deprivation of plaintiffs' property interests without due process of law, in violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

130. As a result of the foregoing, the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force or effect.

EIGHTH CLAIM FOR RELIEF

131. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-130 inclusive, of the within complaint, with the same force and effect as if fully set forth herein.

132. Actions by the President of the United States under legislatively delegated authority must be consistent with the terms of the legislation which authorized it.

133. The action of the President in approving the closure of Plattsburgh Air Force Base after receipt of Commission recommendations which were not in compliance with the explicit requirements of the Act constituted an unauthorized usurpation of power by the President, without statutory or constitutional authority.

134. Therefore, this action by the President violated the doctrine of separation of powers provided in the United States Constitution, and also invalidated the Commission's recommendation to the President to close Plattsburgh Air Force Base.

135. As a result of the foregoing, the Commission and the President exceeded their power and authority under the Act, and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secre-

tary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force or effect.

NINTH CLAIM FOR RELIEF

136. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-135 inclusive, of the within complaint, with the same force and effect as if fully set forth herein.

137. The recommendation and vote of the Commission to close Plattsburgh Air Force Base is subject to review under 5 U.S.C. § 706(2), and is unlawful and must be set aside because, among other things, it constitutes an action that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, contrary to constitutional right, power, privilege and immunity, in excess of statutory jurisdiction, authority, and limitations, short of statutory right, and without observance of procedure required by law.

138. The President improperly and invalidly made his decision to approve the Commission's recommendation to close Plattsburgh Air Force Base, because prior to making this decision, he had received the Commission's aforesaid recommendation which, for the reasons stated hereinabove, was not in compliance with the dictates of the Act.

139. No further right of review or appeal, or any other remedy is available to plaintiffs before the Commission or any other tribunal or court, or under the terms of the Act or any other statute, and substantial, irreparable and immediate

harm and injury will be sustained by the plaintiffs in the absence of the granting of the relief requested herein.

140. As a result of the foregoing, the Commission and the President exceeded their power and authority under the Act and 5 U.S.C. § 706(2), and plaintiffs are thereby entitled to a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202, and 5 U.S.C. §§ 701 *et seq.* declaring and adjudging that the Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's decision approving such closure is illegal, null and void, and of no force and effect, and that any action taken by defendant Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force or effect.

TENTH CLAIM FOR RELIEF

141. Plaintiffs repeat and reallege each and every allegation contained in ¶¶ 1-140 inclusive, of the within complaint, with the same force and effect as if fully set forth herein.

142. The aforementioned lack of compliance with the requirements of the Act adversely effect and aggrieve the plaintiffs by denying to them a fair procedure for the closure of Plattsburgh Air Force Base, as guaranteed by the Act, and further denying to them due process of law, as guaranteed by the Due Process Clause of the Fifth Amendment of the United States Constitution.

143. As a result of the foregoing, including but not limited to the factors of economic and other harm to plaintiffs, as previously set forth herein, there will be immediate, substantial, and irreparable harm and injury to plaintiffs resulting from the closure of Plattsburgh Air Force Base without full compliance with the Act.

144. As a result of the foregoing, plaintiffs are entitled to an injunction enjoining the defendant, Les Aspin, as Secretary of Defense, Sheila Widnall, as Secretary of the Air Force, and their agents and employees, from taking any action to close the Plattsburgh Air Force Base based upon any approval by the President to close the Base, in response to the recommendation of the Commission, dated July 1, 1993, to close the Base, and further enjoining them from taking any action to make McGuire Air Force Base the home base of the East Coast Air Mobility Wing.

145. Plaintiffs have no prompt, adequate and effective remedy at law, and this action, including the granting of the injunction requested herein, is the only available means to them to avoid the aforesaid immediate, substantial, and irreparable harm and injury, and to secure the protection of their rights.

WHEREFORE, plaintiffs demand judgment on their first, second, third, fourth, fifth, sixth, seventh, eighth, and ninth claims for relief declaring and adjudging, pursuant to 28 U.S.C. 2201 and 2202, (and with respect only to their ninth claim, also pursuant to 5 U.S.C. 701 *et. seq.*) that the Defense Base Closure Commission's recommendation to the President, dated July 1, 1993, to close Plattsburgh Air Force Base, and the President's approval of this recommendation is illegal, null and void, and of no force and effect, and that any action taken by the defendants, Les Aspin, as

United States Secretary of Defense, Sheila Widnall, as United States Secretary of the Air Force, and their employees and agents, to close Plattsburgh Air Force Base is illegal, null and void, and of no force and effect; and plaintiffs demand judgment on their tenth claim for relief for an injunction enjoining the defendants Les Aspin, as United States Secretary of Defense, Sheila Widnall, as United States Secretary of the Air Force, and their agents and employees, from taking any action to close the Plattsburgh Air Force Base predicated upon any approval by the President to close the Base, in response to the recommendation of the Commission, dated July 1, 1993, to close the Base, and further enjoining the defendants Les Aspin, as United States Secretary of Defense, Sheila Widnall, as United States Secretary of the Air Force, and their agents and employees, from taking any action to make McGuire Air Force Base the home base of the East Coast Air Mobility Wing, and for such other, further and different relief as to the Court seems just and proper.

Dated: December 2, 1993
Albany, New York

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM 1993

No. 93-289

JOHN H. DALTON,
SECRETARY OF THE NAVY, *ET AL.*

Petitioners,

v.

ARLEN SPECTER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN
SUPPORT OF AFFIRMANCE**

Pursuant to Rule 37.4 of the rules of this Court, Public Citizen seeks leave to file the attached *amicus curiae* brief in support of affirmance.

Public Citizen is a nonprofit corporation with 160,000 members that has worked since 1971 for the enactment and enforcement of strong health, safety, consumer protection, and open government laws. It has brought numerous

lawsuits to ensure federal agency compliance with statutes requiring openness, public participation, preparation of public reports, and governmental accountability. Public Citizen's ability to bring a variety of cases to enforce its members' rights may be affected by the outcome of this case.

Public Citizen also has a longstanding interest in ensuring federal agencies' compliance with their obligation to prepare environmental impact statements on their proposals, as required under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. However, the Court of Appeals for the D.C. Circuit recently embraced the logic that the government urges the Court to adopt here and held that judicial review of a federal agency's refusal to prepare an environmental impact statement, where the President has the ultimate authority over the substantive decision, was not available under the Administrative Procedure Act. *Public Citizen v. Office of the U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. pending*, No. 93-560. Public Citizen seeks to file this brief because the Court's disposition of this case may have a direct impact on the reviewability of NEPA claims, including those at issue in *Public Citizen*.

Public Citizen also seeks to file this brief to demonstrate how this case should be resolved in a way that will not eliminate judicial review for whole categories of NEPA obligations that have consistently been reviewed by the courts in the past, as well as other similar obligations imposed on federal agencies by federal law. Although our views are generally in accord with those of respondents, we differ with respondents on the issue of whether a decision on the merits made by the President must necessarily be set aside as a result of an agency's violations of statutorily mandated procedures. The attached brief asserts that judicial review of an agency's compliance with statutory mandates is available, even though a violation of those mandates need not result in an invalidation of the President's decision.

Petitioners have consented to the filing of this brief. Respondents, however, have declined to consent because they disagree with our position on the merits.

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INTEREST OF AMICUS CURIAE

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STATEMENT OF THE CASE

A. The Statutory Structure.

The Defense Base Closure and Realignment Act of 1990 (the "Act"), Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, established a carefully crafted procedure for identifying and closing unnecessary military bases. First, the Secretary of Defense must employ notice and comment rulemaking procedures to establish the criteria that will be used to select bases for closure in each of three scheduled rounds of base closures. *Id.* § 2903(b). For each round, the Secretary must also prepare a force-structure plan based on an assessment of probable national security threats. *Id.* § 2903(a). The Secretary is required to rely on the selection criteria and force-structure plan in making his base closing recommendations to the President. *Id.* § 2903(b)(2) & (d)(2)(B).

Second, the Secretary of Defense may make base closure recommendations for each round, but he must do so by publishing his recommendations in the Federal Register by April 15th of the base closing decision year (1991, 1993, and 1995). *Id.* § 2903(c)(1). The Secretary's recommendations must include a summary of the selection process and a justification for each recommendation. *Id.* § 2903(c)(2). Moreover, the Act directs that the Secretary consider all military installations equally, without regard to whether they had previously been proposed for closure by the Department. *Id.* § 2903(c)(3). Finally, the Secretary must make all information used in making his recommendations available to the bodies charged by the Act with reviewing his recommendations. *Id.* § 2903(c)(4).

Third, the Act establishes a Defense Base Closure and Realignment Commission, which is charged with reviewing the Secretary's recommendations and making its own base closing recommendations to the President. *Id.* §§ 2902, 2903(d). Specifically, after conducting public hearings on the Secretary's recommendations, *id.* § 2903(d)(1), the Commission must, by July 1st, transmit its own recommendations to the President. *Id.* § 2903(d)(2). The Commission may change the Secretary's recommendations, if it concludes that the Secretary deviated substantially from the force-structure plan and the selection criteria, as long as it explains its reasons for doing so. *Id.* § 2903(d)(2)(B) & (3). Commission meetings must be open to the public, except when classified information is discussed. *Id.* § 2902(e)(2)(A).

Fourth, by May 15th, the Comptroller General must also prepare a detailed analysis of the Secretary's recommendations and selection process. *Id.* § 2903(d)(5). That report must be transmitted to both Congress and the Commission. *Id.*

Fifth, the President has until July 15th to approve or disapprove, in whole or in part, the Commission's base

closing recommendations, with an explanation for any disapproval. *Id.* § 2903(e). If the President disapproves any of the recommendations, the Commission must give the President revised base closing recommendations by August 15th, which the President has until September 1st to approve or disapprove. *Id.* § 2903(e)(4) & (5).

Sixth, the President's decision may be certified and submitted for congressional review only if the President approves a set of the Commission's base closing recommendations in their entirety. *Id.* § 2903(e)(2), (4). Congress then has a limited period of time (no more than 45 session days) in which to enact a joint resolution disapproving the base closing recommendations in their entirety. *Id.* § 2904(b). If Congress does not take such action, then all of the base closing recommendations must be implemented. *Id.* § 2904(a).

B. The Proceedings in this Case.

This case concerns the base closing recommendations for the first round of base closures in 1991, which were approved by the President, and for which Congress failed to enact a disapproval resolution. Thereafter, this lawsuit was brought under the Administrative Procedure Act ("APA"), seeking to enjoin closure of the Philadelphia Naval Shipyard. Respondents claimed, *inter alia*, that the recommendation process actually used by the Commission and the Secretary of Defense violated the base closing statute.

The district court dismissed, but a divided panel of the Third Circuit affirmed in part and reversed in part. 971 F.2d 936 (1992). The court held that the President's ultimate decision -- whether to approve the Commission's base closing recommendations -- is unconstrained by the base closing statute and hence is committed to his discretion and unreviewable. *Id.* at 944-46. Similarly, it concluded that Congress intended to preclude review of claims that went to the merits of the Secretary's or Commission's

recommendations or of the force-structure plan. *Id.* at 950-52. In contrast, the court found no congressional intent to preclude review of claims that the recommendation process was illegal because the Secretary had failed to publish a summary of the selection process and the justification for his base closure recommendations, *id.* at 952, the Commission had failed to hold public hearings, *id.* at 952-53, and the Secretary had failed to transmit to the Commission and the Comptroller General all the information used in making his recommendations. *Id.* at 952.

According to the court, however, review of these procedural claims is limited in two respects. First, no judicial review is available until the President's decision becomes effective because of the Base Closing Act's tight timetables and the preliminary nature of the steps in the process prior to the President's decision. *Id.* at 945-46. Second, "[w]hether or not a violation receives a remedy is something that a court must determine through an exercise of its discretion . . . [and] [t]hus, judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one." *Id.* at 950.

This Court vacated and remanded the case for further consideration in light of its intervening decision in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). On remand, a divided panel held that *Franklin* does not affect the reviewability of respondents' procedural claims. 995 F.2d 404. The court held that, as distinct from the merits of the base closing recommendations, which it previously held are unreviewable, the courts could review claims that the Secretary or the Commission violated specific, nondiscretionary aspects of the statutory recommendation process. It reasoned that "the fact that [the President] played a role provides no justification for holding the process and the final executive action immune from review for compliance with mandatory procedural requirements of the Act." *Id.* at 411. Moreover, according to the court, any

deviations by the Secretary or the Commission from the base closing statute could be so significant that they would nullify the delegation of decisionmaking authority to the President and make his decision *ultra vires*. *Id.* at 408-09.

SUMMARY OF ARGUMENT

Nothing in *Franklin* reverses the presumption embodied in the APA that an agency's violations of its independent statutory obligations are judicially reviewable. Thus, even where the President makes a final decision on the merits, APA review is still available to determine whether an agency has violated its independent statutory mandates to conduct public hearings, prepare public reports and impact statements, make its records or meetings open to the public, or ensure public participation in its decisionmaking process leading to the President's decision. When an agency fails to comply with these obligations, its action is final and reviewable, and the courts have the power to remedy the agency's noncompliance, where that is possible. Indeed, the fact that the President's decision on the merits is unreviewable is more, not less, of a reason for the courts to assure that the agency complies with the statutory directives given it by Congress.

Franklin stands for the proposition, in keeping with other past precedent, that the merits of the President's base closing decision are not reviewable. In seeking to extend this principle to preclude review of the agencies' compliance with their statutory obligations, the government confuses the issue of reviewability and the appropriate remedy. As the Third Circuit recognized in its first decision, the fact that an agency has deviated from statutorily mandated procedures does not mean that the courts will invalidate the decision made as a result of the flawed process. The President's decisionmaking authority may further limit the available remedies, but that does not make the agencies' actions unreviewable.

ARGUMENT

THE ROLE OF THE PRESIDENT UNDER THE BASE CLOSING ACT DOES NOT RENDER UNREVIEWABLE CLAIMS THAT FEDERAL AGENCIES VIOLATED THEIR INDEPENDENT OBLIGATIONS UNDER THAT ACT OR OTHER PROVISIONS OF LAW.

Amicus agrees with the Third Circuit that nothing in *Franklin* means that the President's involvement in this and other similar decisionmaking processes eliminates APA review that would otherwise be available to determine whether federal agencies have complied with nondiscretionary statutory mandates. To understand why *Franklin* does not radically alter APA review in the way urged by petitioners, this brief begins by discussing the availability of judicial review and the APA's finality requirement prior to *Franklin*. It then explains how the *Franklin* decision flows from, and is consistent with, past jurisprudence. Finally, the brief describes the types of statutory claims against agencies that may still be reviewed under the APA pursuant to past practice and the rationale of *Franklin*, if not all of its language.

A. An Agency's Compliance with its Statutory Mandates is Presumptively Reviewable.

The APA was heralded by its drafters as ensuring that judicial review is available "to afford a remedy for every legal wrong." Senate Judiciary Committee, Administrative Procedure Act Report on S.7, 79th Cong., 1st Sess. (1945), in *Administrative Procedure Act: Legislative History* at 193, 304 (1946); *id.* at 325-26 (colloquy between Sen. McCarran & Sen. Austin); *id.* at 368 (statement of Rep. Walter). Thus, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court

are subject to judicial review." 5 U.S.C. § 704.

In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), this Court construed this provision to embody a presumption of reviewability:

[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Early cases in which this type of review was entertained have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved within the meaning of a relevant statute."

Id. at 140 (quoting 5 U.S.C. § 702, APA standing requirement; citations omitted). See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986) ("We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command").

Under this presumption, legislative silence is insufficient to preclude judicial review. As the House Judiciary Committee made clear, there must be "clear and convincing evidence of an intent to withhold" judicial review, and "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." Report on S.7, 79th Cong., 1st Sess. (1945), in *APA Legislative History* at 275; *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (no clear and convincing evidence of legislative intent to preclude judicial review of agency decision there).

The APA spells out the circumstances in which the presumption of reviewability may be overcome. Section 701

creates exceptions to judicial review to the extent that a statute precludes review or commits the action to agency discretion by law. As explained by the Attorney General's Committee which was deeply involved in the development of the APA, judicial review is available under the APA "[i]f a party can show that he is 'suffering legal wrong'" and "legislation does not indicate that judicial review is precluded or withdrawn." *APA Legislative History* at 37-38; see also Appendix to Attorney General's Statement on Revised Committee Print (1945), in *APA Legislative History* at 229.

Congress envisioned that statutory preclusion of review would rarely be found:

It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases.

House Judiciary Committee Report, in *APA Legislative History* at 275. Moreover, the APA's limitations on judicial review of matters committed to agency discretion are inapplicable to questions of law:

Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. . . . [W]here statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits

as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.

Id. In other words, the APA's presumption of reviewability is at its zenith with respect to claims that an agency has exceeded its statutory authority or acted in contravention of the Constitution.

This is consistent with principles of judicial review preceding the enactment of the APA. Thus, as far back as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163-65 (1803), this Court established the general proposition that, if a statutory right is violated, the aggrieved person has a remedy through a writ of mandamus to compel compliance with nondiscretionary statutory mandates. *See also* *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 545 (1937); *Work v. U.S. ex rel. Rives*, 267 U.S. 175, 177 (1925); *U.S. ex rel. Kansas City Southern Ry. Co. v. ICC*, 252 U.S. 178, 187 (1920); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610-11 (1838). Outside the mandamus context, and prior to the APA, courts regularly reviewed claims that agencies exceeded their statutory authority. *Stark v. Wickard*, 321 U.S. 288 (1943) (deductions from milk producers fund allegedly contrary to statute); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (Court reviewed postmaster general's detention of mail without statutory authority).

The APA codifies this strong presumption of judicial review of agency compliance with statutory mandates. *See* 5 U.S.C. § 706(2)(A), (C) & (D). Therefore, under the APA, if a live controversy exists, if the parties seeking review have standing, and if Congress has not excluded a decision from judicial review, the federal courts are available to ensure agency compliance with statutory mandates.

B. The APA's Final Agency Action Requirement is Sufficiently Flexible to Permit Review of an Agency's Compliance with its Independent Statutory Mandates.

The APA's final agency action requirement is contained in the provision embodying the presumption of reviewability, not in the APA's exception to that presumption. The House and Senate Judiciary Committees equated "final agency action" with "effective or operative agency action for which there is no other adequate remedy in any court." House Judiciary Committee Report, *in APA Legislative History* at 277; Senate Judiciary Committee Report, *in APA Legislative History* at 213. Moreover, there is some indication that the final agency action requirement was designed simply "to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available" *APA Legislative History* at 37.

The other sentences of Section 704 further demonstrate that Congress was not trying to curtail judicial review of actions adversely affecting potential litigants. Thus, preliminary rulings are expressly made reviewable on review of the final agency action, and final actions are reviewable, even if they are under internal administrative appeal, unless the agency requires by rule that the action is inoperative pending further agency review. 5 U.S.C. § 704. Thus, the final agency action requirement delays judicial review until the agency has made its final decision or taken its final action on the matter at issue.

As a timing provision, Section 704's purpose is to avoid premature judicial involvement in the agency decisionmaking process, not to preclude review entirely. Where Congress has delegated decisionmaking authority to an agency, the courts are poorly equipped to review and defer to the agency's decision without a full administrative record, including a complete statement of the reasons for the

decision. R. Pierce, S. Shapiro, & P. Verkuil, *Administrative Law & Process* 182-83 (1985). Moreover, postponing judicial review until after the agency has made its final decision avoids unnecessary litigation. See *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976); *Public Citizen v. Office of the U.S. Trade Representative*, 970 F.2d 916, 920 (D.C. Cir. 1992). None of these purposes is served by foreclosing judicial review once the agency has taken its final steps under a particular statutory mandate, i.e., held a meeting in secret, issued a regulation without obtaining public comment, or failed to prepare a public report by the time required.

In the most definitive construction of the APA's final agency action requirement, *Abbott Laboratories* stated that agency action is defined broadly and that the finality requirement is to be interpreted in a pragmatic way. 387 U.S. at 149. The core question is whether the agency action is "definitive" as opposed to tentative, informal, or the ruling of a subordinate official. *Id.* at 151.¹

¹In *Abbott Laboratories*, the Court discussed finality as part of its broader ripeness inquiry. 387 U.S. at 148-49. In that context, the Court concluded that the case was ripe because the regulation required immediate compliance by the petitioners, which gave them a sufficient interest to seek pre-enforcement review of it. Compare *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967) (regulation authorizing certain actions if a company refuses an inspection may never apply to petitioners, and thus the challenge will not be ripe until the regulation is applied). By focusing on whether the agency action affects the litigants' conduct, the ripeness analysis injects standing considerations into the inquiry. However, it does so in conjunction with the constitutional case or controversy requirement, not under the APA's finality requirement. See also *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, 891-93 (1990).

The focus of the finality inquiry has been on whether the agency has completed its decisionmaking process. Thus, where an agency has conducted an investigation, but not decided whether the facts adduced in that investigation warrant an agency enforcement action, there has been no final agency action, particularly where the factual results of the investigation may be challenged in a subsequent enforcement proceeding. *United States v. Los Angeles & Salt Lake RR Co.*, 273 U.S. 299 (1927). Similarly, the initiation of administrative enforcement proceedings is not a final agency action, because it is not a definitive statement of position, it has no legal force, and the entity has another remedy at law -- defending itself in, and challenging the propriety of, the enforcement proceeding. *FTC v. Standard Oil Co.*, 449 U.S. 232, 241-42, 245 (1980). In contrast, where an agency has promulgated a regulation that codifies its interpretation of a statute, its decision is final, particularly where private parties are required to adjust their conduct to comply with that interpretation. *Abbott Laboratories, supra*; *Gardner v. Toilet Goods Association, Inc.*, 387 U.S. 167 (1967); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *CBS, Inc. v. United States*, 316 U.S. 407 (1942).

From *Abbott Laboratories* and its progeny, it follows that a tentative ruling, or one subject to authoritative reconsideration, is not final. *Abbott Laboratories*, 387 U.S. at 151; *National Automated Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 699-700 (D.C. Cir. 1971). Nor is the view of a subordinate official ordinarily considered a final action of the agency if there is likely to be review at higher levels of the agency. *Abbott Laboratories*, 387 U.S. at 151; cf. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (determining whether subordinate official had final decisionmaking authority for purposes of Freedom of Information Act exemption for predecisional agency deliberations); *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975) (same). In

contrast, the ruling of an agency head is presumptively final, in the absence of some indication that it is tentative. *National Automated Laundry*, 443 F.2d at 701. Similarly, a decision is likely to be considered final if it results from a formal process, such as notice and comment rulemaking, that is designed to take into account the views of outsiders and to state the agency's definitive interpretation. *Storer Broadcasting*, 351 U.S. at 198; *CBS*, 316 U.S. at 418; *National Automated Laundry*, 443 F.2d at 698-99; see also *Frozen Foods Express v. United States*, 351 U.S. 40 (1956) (administrative order exempting certain commodities from certificate requirements is final). Moreover, in contrast to an agency official's advisory opinion on a hypothetical question, an order is subject to APA review provided that it is not abstract, theoretical, or academic. Cf. *Helco Products Co. v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943), with *Frozen Food Express*, 351 U.S. at 44. It follows from these cases that the final agency action requirement is met where the agency has taken all the steps that it must take to finalize its decision with respect to the particular action that is challenged.

Under this analysis, courts have routinely reviewed agencies' compliance with their specific statutory obligations. Thus, regulations are reviewable for procedural defects upon their promulgation, even before they have been applied to specific parties. See, e.g., *Public Citizen v. Nuclear Regulatory Commission*, 940 F.2d 679 (D.C. Cir. 1991). An agency's or an advisory committee's refusal to open a meeting to the public is reviewable once the decision to close the meeting has been made, without waiting for implementation of any decision made at the meeting. *ITT World Communications v. FCC*, 466 U.S. 463 (1984); *Common Cause v. NRC*, 674 F.2d 921 (D.C. Cir. 1982); *Public Citizen v. National Economic Commission*, 703 F. Supp. 1123 (D.D.C. 1989). In addition, an agency's failure to take an action required by statute is reviewable once the time for taking the action has allegedly past. Thus, courts

have reviewed claims that an agency has unreasonably delayed taking required actions. See, e.g., *Cutler v. Hayes*, 818 F.2d 879 (D.C. Cir. 1987); 5 U.S.C. § 706(1). Similarly, an agency's denial of a rulemaking petition, or its failure to suspend or cancel the registration of a hazardous pesticide, has been reviewed under the APA, even though there has been no "final" action in an affirmative sense. *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

In sum, the final agency action requirement has never been construed to preclude APA review of a challenge to an agency's failure to take a statutorily mandated, nondiscretionary action, when the time for taking that action has past. If review of such violations is unavailable, it will not be because no final agency action has occurred, but rather because the controversy is not ripe, and therefore judicial review is inappropriate at that time, see *Toilet Goods, supra*, or because no party has standing under 5 U.S.C. § 702.

C. Pre-Franklin Judicial Review of Presidential Decisions and Related Agency Actions Has Followed This Pattern.

Although the courts have viewed most presidential actions to be discretionary and hence unreviewable, they have nonetheless been willing to decide whether the President has exceeded his statutory or constitutional authority, most notably in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). There, in order to avert a labor strike that would have stopped the production of steel needed for the Korean War effort, President Truman directed the Secretary of Commerce to take possession and operate the steel mills. The steel companies challenged the seizure, and this Court decided that the President also lacked the authority to seize the steel mills. First, it determined that Congress had not

authorized the seizure and, in fact, had specifically declined to authorize governmental seizures as a means of settling labor disputes. Then the Court decided that the President also lacked authority under the Constitution to order the seizure.

Similarly, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court ruled that, as part of an agreement to release U.S. hostages held by Iran, the President had the statutory and constitutional power to nullify attachments on Iranian assets and to require the resolution of pending court claims against Iran through binding international arbitration. In both *Youngstown* and *Dames & Moore*, the plaintiffs sued federal agencies rather than the President, but the Court recognized that it was being called upon to decide whether the President had the authority to issue the underlying order. The fact that the President directed the agencies to take action did not insulate their actions from judicial review on the ground that the President had exceeded his authority.

Likewise, in *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 181, 184 (1919), this Court held that the courts had no power to review whether the President abused his discretion in taking possession of telephone lines pursuant to a congressional delegation to him to do so "whenever he shall deem it necessary for the national security or defense." The Court did, however, review whether the President exceeded the authority granted by Congress, holding that he did not. *Id.* at 184-85.

This approach to judicial review of presidential actions is consistent with the parameters initially established in *Marbury v. Madison* and later applied to a mandamus action to compel President Nixon to grant pay increases mandated by statute. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974). Where a statute imposes a nondiscretionary obligation on the President, or expressly denies him certain authority, the courts have heard claims that the President has violated that statute.

In practice, such review has rarely been undertaken. This is because such statutory obligations are typically assigned to agency officials who are then sued directly. Where statutes assign authority to the President, they frequently leave the exercise of that authority to the President's discretion. See, e.g., *Dakota Central*, *supra*. Thus, even though, prior to *Franklin*, the courts, in keeping with the views of leading scholars, assumed that the APA applied to the President, they generally considered the President's actions within the exception to judicial review for actions committed to discretion by law. See K. Davis, *Administrative Law Treatise* at 275 (2d ed. 1984).

In the lead case holding presidential actions unreviewable, *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), this Court decided that it had no authority under pertinent statutes to review the President's decision to grant or deny applications to air carriers to engage in overseas and foreign air transportation. Although the Civil Aeronautics Board conducted a hearing and made a recommendation to the President as to whether to grant a certificate to engage in such air transportation, the President had unconstrained statutory power to approve, modify, or deny any approval, denial, amendment, transfer, cancellation or suspension of such a certificate. In *Waterman Steamship*, the President had disapproved certain portions of the Board's recommendation, directed the Board to make specific changes because of unspecified "factors relating to our broad national welfare," and then approved a revised order that complied with his directions. Because there was no dispute that the President had unconstrained statutory authority to make such determinations, the Court held that the courts did not have the power to review orders of the Board that were issued entirely at the President's direction. Similarly, in *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940), this Court held that the President's proclamation of changes in duty rates was unreviewable because the statute authorized

the President to approve tariff changes recommended by the Tariff Commission if "in his judgment" such changes were necessary to equalize differences in production costs.

In both *Waterman Steamship* and *Bush*, the presidential decision was predicated upon a recommendation made by an agency. Thus, in *Bush*, the Tariff Commission conducted a hearing and made findings upon which the President based his determination. The Civil Aeronautics Board in *Waterman Steamship* likewise conducted a hearing and made a recommendation to the President as to whether to grant a certificate to an air carrier to engage in foreign air transportation. Since the President had unfettered discretion to accept, reject, or modify the agencies' recommendations, the merits of those recommendations could not be reviewed.

Therefore, prior to *Franklin*, the courts did not review discretionary actions of the President, but they did review claims that the President had exceeded his statutory or constitutional authority. To prevent circumvention of the former principle, judicial review of an agency's recommendations for presidential action was precluded if the President's decision was not subject to judicial review. However, this Court has never held that a President's decision to undertake a particular action alone insulates an agency's implementation of that decision from judicial review. Thus, not only have the courts decided whether the President has exceeded his authority, but they have also, for example, routinely decided whether agencies have complied with their independent obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, to prepare environmental impact statements with respect to their implementation of presidential decisions. See, e.g., *Romer v. Carlucci*, 847 F.2d 445 (8th Cir. 1988) (*en banc*) (deployment of MX missiles pursuant to presidential basing recommendation approved by Congress); *Wisconsin v. Weinberger*, 745 F.2d 412 (7th Cir. 1984) (submarine communications system President decided to deploy); *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) (U.S.

participation in construction of Pan American highway pursuant to international agreement); *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (removal of chemical weapons from Germany pursuant to presidential agreement). In short, the fact of presidential involvement alone has never been a basis for the elimination of all judicial review of an agency's actions.

D. *Franklin* Applied Existing Reviewability Principles Without Further Limiting the Reviewability of Agency Actions.

In *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this Court construed the respective statutory roles of the President and the Secretary of Commerce in determining how to count overseas citizens in the decennial census. Under the automatic reapportionment statute, the Secretary undertakes the decennial census and submits a report with the results of the census to the President. 13 U.S.C. § 141(a) & (b). The President thereafter must submit to Congress a statement of the census results and the number of Representatives to which each state is entitled under a prescribed method of calculation. 2 U.S.C. § 2(a). The State of Massachusetts had sought to have the President's census submission set aside on the grounds that the Secretary's report, on which that submission was based, was arbitrary and capricious.

This Court concluded that the statute gave the President final decisionmaking authority with respect to the decennial census calculations that he transmitted to Congress, and that the Secretary simply made a recommendation to him. 112 S. Ct. at 2773-75. On that basis, and because the Court held that the President is not an agency subject to APA review, Massachusetts could not obtain APA review of the

Secretary's census report. *Id.* at 2773-76.²

Under the majority's construction of the census statute, *Franklin* is neither new nor controversial. Rather, it follows from the rationale of *Bush*, *Waterman Steamship*, and *Dakota Central*: Where a statute vests the President with discretionary authority, his exercise of that authority is not reviewable for abuse of discretion.

Similarly, *Franklin* hardly revolutionizes the legal landscape in holding that the APA provides no basis for substantive review of agency recommendations to the President under such a statute. *Waterman Steamship* and *Bush* held long ago that review of the merits of such recommendations is unavailable where the statute gives the President final unreviewable discretion. In holding that an agency recommendation to the President cannot be challenged as a means to set aside the President's decision, *Franklin* is entirely consistent with past jurisprudence.

Moreover, for the most part, *Franklin* applied the criteria that had been used previously to determine whether an agency's action is final. Thus, the majority asked whether the agency had completed its decisionmaking process, whether the Secretary's census report was a tentative recommendation, rather than a final, binding determination, and whether the report was the action of a subordinate official, subject to revision by a superior. 112 S. Ct. at 2773-75. Applying these factors, the Court concluded that, although the census report was the culmination of the agency's decisionmaking process, it made recommendations

²Four Justices did not join that part of the decision because they concluded that the statute did not give the President discretion to modify the census results reported by the Secretary. Hence, those Justices concluded that the Secretary's report is a final agency action subject to APA review. *Id.* at 2779-83.

that were subject to revision by the President, and thus its calculations were a moving target prior to the time the President acted. *Id.* at 2774-75. Since the case challenged the census calculations, the Court held that "the final action complained of is that of the President." *Id.* at 2773.

The majority opinion also stated that review is not available unless "the result of [the agency's decisionmaking] process is one that will directly affect the parties." *Id.* This requirement is hardly controversial where, as in *Franklin*, the President has decisionmaking power and substantive review is sought of agency recommendations to him.

In other contexts, however, such as where review is sought of an agency's independent procedural obligations that do not directly involve the substantive outcome of the agency's actions, this phrase in *Franklin* commingles the APA's finality requirement with standing, ripeness, and mootness issues, in a way that might inappropriately preclude review. It need not lead to that result if the challenged action is properly understood, and if the effects on the parties are addressed in a proper manner. Thus, the correct approach, as recently articulated by this Court, is that APA review is available for an agency's failure to adhere to its independent procedural obligations without requiring any showing that compliance with the obligations would change the agency's substantive outcome. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2142-43 n.7 (1992) (a party may assert violations of procedural rights without meeting normal standing requirements for redressability and immediacy). Under this approach, as demonstrated in the following section, the courts may undertake APA review of various challenges under the Base Closing Act, as well as of analogous requirements imposed under other statutes, even though the ultimate decision on the merits is made by the President or someone else who is not subject to APA review.

E. An Agency's Compliance with its Independent Statutory Obligations is Still Reviewable After *Franklin*, Even Where the President is the Ultimate Decisionmaker.

Prior to *Franklin*, this Court consistently held that the President's exercise of discretionary decisionmaking power could not be reviewed by the courts. *See supra* at 15-18. Although the Court did so generally by finding a statutory delegation of discretionary authority, or that the matter was committed to presidential discretion by law, *Franklin* reached the same result through its holding that the President is not an agency under the APA.

Under these principles, the merits of the base closing decision are unreviewable because the President has unfettered discretion under the base closing statute to decide whether to approve the Commission's recommendations. That much is not disputed. The question is whether *Franklin* stands in the way of judicial review of compliance by the Secretary and the Commission with their independent procedural obligations in developing the recommendations that are sent to the President for his approval. Or, to put the matter more starkly, does *Franklin* mean that the courts should have summarily dismissed *Youngstown*, *Marbury*, or *Dames & Moore*?

Such a result is wholly unwarranted because the APA embodies a more limited approach to preclusion of judicial review. Under the APA's exceptions to judicial review, review of agency actions is barred only "to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law." 5 U.S.C. § 701(a) (emphasis added); *see John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 62 U.S.L.W. 4025, 4031 (S.Ct. Dec. 14, 1993). By analogy, where a statute assigns decisionmaking authority to the President, judicial review should be precluded *only to the extent* of that statutory assignment. In other words, the fact that the

President has ultimate decisionmaking authority should not foreclose judicial review of agency actions that are independent of the matters assigned to the President.

This approach is followed under the Freedom of Information Act ("FOIA"), which provides a public right of access to "agency records," but not to records in the possession of the President. Despite the exclusion for presidential record, all records created by agencies are subject to the Act, even if they are closely connected to a presidential function, such as the nomination of federal judges, or if they are created by an agency at the President's request. *See Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971). A contrary approach would permit the presidential exclusion to swallow up FOIA's coverage. *See also Armstrong v. Executive Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) (basis for treating records as presidential records is subject to judicial review, even though judicial review is precluded of treatment of properly designated presidential records). For the same reasons, the exclusion of the President from the APA does not eviscerate the APA's broad presumption of reviewability of agency actions. Judicial review is still available to determine whether an agency has complied with its independent statutory obligations, even where, as in *Franklin*, the merits of the agency's recommendation and the President's decision are not subject to judicial review.

By way of example, if the census statute had required the Secretary of Commerce to publish a report when she gave her advice to the President, and the Secretary did not make her report public, surely the courts could, under the APA, have reviewed a challenge to that violation of the statute. Similarly, despite the contrary suggestion in the Third Circuit's first opinion, 971 F.2d at 945-46, 948, a member of the public who wanted to attend a hearing of the Base Closing Commission could bring a lawsuit under the APA challenging the Commission's plan to close a

forthcoming hearing in violation of the base closing statute, § 2903(d). Likewise, if the Secretary of Defense developed the base closing selection criteria without publishing a proposal in the Federal Register, providing an opportunity for public comment, or publishing the final criteria, as required under the base closing statute, *id.* § 2903(b), the fact that the President makes the final base closing decision would not preclude judicial review of those failures.

In these respects, many of the obligations imposed by the base closing statute on the Secretary and the Commission are analogous to those imposed on agencies by other statutes of general applicability. Thus, the process of developing the base-closing selection criteria is analogous to the APA's notice and comment rulemaking requirements, 5 U.S.C. § 553, and the Commission's open meeting mandate is similar to the open meeting requirements of the Government-in-the-Sunshine Act and the Federal Advisory Committee Act ("FACA"). 5 U.S.C. § 552b & App. 2. In addition, the publication requirements for the Secretary's selection criteria and base closing recommendations resemble the affirmative disclosure requirements of the FOIA. 5 U.S.C. § 552(a).

These general statutes impose independent obligations on federal agencies. When an agency fails to comply, its action is final, and no action by a subsequent decisionmaker, be it the President or Congress or even another agency, will, as a matter of course, correct that error. Moreover, the action complained of is the agency's failure to make its report public, to publish its decision, or to open a hearing or meeting to the public, and the agency's action directly affects the parties by depriving them of information or access to which they have a statutory right. Accordingly, violations of those kinds of statutory obligations are reviewable, even under the finality test enunciated in *Franklin*.

This logic applies to other statutory procedures governing an agency's development of recommendations. For example, FACA requires federal agencies to adhere to

certain procedures when they obtain advice from federal advisory committees. In *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), the plaintiffs sought to compel the Department of Justice to comply with those procedures when it obtained advice to transmit to the President on potential judicial nominees. No one remotely suggested that the President's constitutional role in nominating judges transformed the agency's noncompliance with its independent statutory obligations under FACA into a tentative or otherwise nonfinal action excluded from APA review. Indeed, if it had that effect, this Court could have avoided deciding very difficult statutory and constitutional issues.

Similarly, NEPA requires federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement ("EIS") of the proposed action. This mandatory obligation is imposed on federal agencies in connection with their recommendations on proposed actions, even if some other agency or the President or Congress will decide whether to adopt the proposal. *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (Court reviewed NEPA compliance with respect to agency permit for development even though agency had to approve subsequent development plan before construction could begin). Indeed, NEPA expressly applies to agency recommendations on proposals for legislation, even though it is the President who has the constitutional authority to recommend legislation to Congress. U.S. Const. art. II, § 3, cl. 1.

Nothing in NEPA provides the slightest hint that Congress intended to exclude legislative EISs or other EISs involving presidential decisions from judicial review. To the contrary, when Congress has wanted to preclude judicial review of NEPA claims with respect to specific presidential actions, it has done so expressly through statutory exemptions. *See, e.g., Department of Defense*

Appropriations Act of 1983, Pub. L. No. 97-377, 96 Stat. 1847-48 (1982) (MX missile basing system). Indeed, the base closing statute at issue here contains such an express exemption from NEPA for the President's base closing decision and recommendations of the Commission and the Secretary. Act, § 2905(c). The legislative history of that provision makes clear that the exemption was prompted by problems caused by judicial review of past NEPA claims. H.R. Conf. Rep. No. 1017, 100th Cong., 2d Sess. at 23 (1988). Yet, the exemption would plainly be unnecessary if judicial review were precluded due to *Franklin* and the President's decisionmaking role.

For more than two decades, the courts have consistently construed NEPA and the APA to allow judicial review, regardless of whether the underlying action involves a legislative proposal or some other presidential authority. They have done so based on one of this Court's early NEPA cases, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976), which established the time for judicial intervention as "when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." Thus, it is the agency's issuance of its report or recommendation, not when that recommendation takes effect, that is the occasion for judicial review.³

³For legislative EISs, see *Trustees for Alaska v. Hodel*, 806 F.2d 1378 (9th Cir. 1986); *Izaak Walton League v. Marsh*, 655 F.2d 346, 365 (D.C. Cir.), cert. denied, 454 U.S. 1092 (1981); *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977); *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991).

For EISs on requests for appropriations, see, e.g., *Andrus v. Sierra Club*, 442 U.S. 347 (1979); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164

(continued...)

Nothing in *Franklin* changes this approach to NEPA judicial review. As this Court recognized in *Kleppe*, the agency has taken its final action its final action for purposes of NEPA once it has made its report or recommendation on a proposal without an EIS or with an inadequate one. At that time, the agency has completed its decisionmaking process, and no subsequent actions of the President, the Congress, or anyone else, except a court, can correct any deficiencies. Litigants who satisfy the APA's standing requirement, i.e., they are aggrieved within the meaning of NEPA, will also satisfy the *Franklin* requirement that they be directly affected by the agency's NEPA violations, most often because those violations deprive them of statutorily mandated information on an action that may cause them harm, if implemented. Assuming implementation is still a possibility, and not yet completed, i.e., the case is ripe and not yet moot, APA review is available.⁴

³(...continued)
(6th Cir. 1972).

For agency recommendations for legislative designation of wilderness areas, including those required by statute to be submitted by the President, see, e.g., *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992); *California v. Block*, 690 F.2d 753 (9th Cir. 1982).

For EISs in connection with presidential military or foreign affairs decisions, see *supra* at 18-19.

⁴One post-*Franklin* case confirmed that APA review is available for an agency's refusal to prepare a supplemental EIS on its recommendations for wilderness designations, even though the President has statutory authority to submit such designations to Congress, and Congress must pass a law affording wilderness protection. *Colorado Environmental Coalition v. Lujan*, 803 F. Supp. 364, 370 (D. Colo. 1992).

(continued...)

Nor does *Franklin* eliminate judicial review of NEPA cases or other cases seeking agency compliance with their independent statutory obligations, even where those obligations are part of the process leading to the development of recommendations for the President. APA review is available, as long as the case is not, in fact, seeking review of the President's decision or of the merits of the agency's recommendations. Although the President's action may render a controversy moot, it does not eliminate judicial review of agency actions that are final and still present a live controversy.

However, the fact that those actions are reviewable under the APA does not mean that violations will automatically result in setting aside the President's decision. Once a court finds a violation of an agency obligation, it would then determine the appropriate remedy. *Harper v. Virginia*, 113 S. Ct. 2510, 2519-20 (1993). Certainly, the court could order the preparation or release of an agency report. A court could also direct an agency to open a future hearing, or it could order the release of a transcript of an improperly closed hearing. In addition, a court could declare and even direct that the agency must comply with notice and comment rulemaking procedures or prepare an EIS.

⁴(...continued)

By contrast, another case brought by *amicus* Public Citizen held (incorrectly in our view) that the Office of the U.S. Trade Representative's decision not to prepare an EIS on the North American Free Trade Agreement ("NAFTA") is not subject to APA review because the court deemed the NAFTA itself to be the challenged action, rather than the Office's recommendation on the NAFTA, and because the decision to enter into the NAFTA is a presidential, not an agency, action. *Public Citizen v. Office of the U.S. Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. pending*, No. 93-560.

However, where the President makes the ultimate decision, a court might well decide that a particular statutory violation by an agency does not warrant setting aside the President's decision. See 5 U.S.C. § 552b(h)(2) (courts may not set aside or enjoin underlying agency action based on Sunshine Act violation).⁵

At the same time, the courts might properly set aside a decision (even if made by the President) where it is in excess of statutorily delegated authority. Thus, if, in direct contravention of the statute, the President added a base to the Commission's recommendations and certified and transmitted his list to Congress, and if Congress failed to act within the allotted time, surely the courts could enjoin closure of the added base because the President exceeded his statutory authority by adding it to the list. Similarly, if the Secretary and the Commission completely disregarded the entire statutory scheme and simply transmitted an old Department of Defense base closing list to the President, or picked names of bases randomly out of a hat, without complying with any part of the process prescribed in the Base Closing Act, the statutory violations might be so fundamental that the President would no longer have the authority under the statute to make the recommendations effective.

Amicus takes no position on whether the statutory violations alleged by respondents here would, if proven, so

⁵Because compliance with procedural requirements may be ensured most effectively, and with the least interference with the base closing decisionmaking process, prior to completion of that process, *e.g.*, by ordering that public hearings be held, rulemaking procedures be followed, or records be made available, *amicus* disagrees with the conclusion of the Third Circuit in its first decision that judicial review of alleged violations of such provisions is unavailable until after the President makes his decision. 971 F.2d at 945-46, 948.

infect the decisionmaking process that they eviscerate the President's decisionmaking power. Rather, we contend that, even if the President's discretion is not constrained by the statutory procedures, the agencies' compliance with their independent statutory obligations is subject to APA review, although possibly without the relief that respondents ultimately seek.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed.

Respectfully submitted,

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January 1994